

Radhe Developers and ors. Vs. Income Tax Officer and ors.

Radhe Developers and ors. Vs. Income Tax Officer and ors.

SooperKanoon Citation : sooperkanoon.com/75721

Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : Jun-29-2007

Reported in : (2008)113TTJ(Ahd.)300

Judge : R Garg, Vice, M Singh

Appellant : Radhe Developers and ors.

Respondent : income Tax Officer and ors.

Judgement :

1. These 45 appeals of the assesseees and the Revenue are against the order of CIT(A) for various assessment years. Facts and circumstances in all the appeals being similar, they are disposed of by this common order by discussing the facts as they appear in the case of Radhe Developers (ITA No. 2482/Ahd/2006) which are stated to be representing for all.

2. The common issue in these appeals is, whether the assessee is eligible for the claim of deduction under Section 80-IB(10) of the Act, on the profit derived from developing and building residential housing project, particularly when the land is not registered in assessee's name and whether the ownership is a precondition to claim of deduction under Section 80-IB(10) of the Act? 3. The briefly stated facts are that the assessee had developed and built a housing project on a land at Revenue Survey No. 648 belonging to one Shri Ghanshyambhap A. Patel and others, through power of attorney holder, Mahendrabhai A. Patel, who are the owners of the land.

The assessee firm had entered into a development and construction agreement with (1) Shri Vinodbhai Nathabhai Patel, HUF, (2) Shri Bhailalbhai Nathabhai Patel, HUF, (3) Harishbhai Nathabhai Patel HUF and (4) Shri Hashmukhbhai Nathabhai Patel through their partner, Shri.

Chetankumar Rameshbhai Jogi. The development and construction agreement and Banakhat agreement are both dt. 18th May, 2000. There was a tri-party development agreement revealing that the landowners agreed to get the land developed through the assessee firm and also agreed that the assessee firm would make the members i.e., prospective buyers and collect the land consideration at the rate mentioned in the agreement.

The project was approved by the local authority, Baroda Municipal Corporation (hereinafter referred to as 'BMC') on 17th July, 2000. The approval was in the name of the said owners of the land. As the assessee firm is not the owner of the land and even the approval for permission to develop and construct the project was also not in the name of the assessee but, in the name of the original landowners, the AO held that the assessee has merely acted as an agent/contractor for construction of residential houses, and therefore, did not satisfy the conditions for granting the claim of deduction under Section 80-IB(10) of the Act and accordingly not entitled to the deduction.

4. The CIT(A) dismissed the assessee's appeal vide discussion in para Nos. 15 and 16 of his order in the following terms: 15. Therefore, the deduction under Section 80-IB(10) r/w Section 80-IB(1) and Rule 18BBB is admissible only to such assessees as are deriving profits from an undertaking of building and housing projects approved by the local authority, and for such approval, the assessee must legally own the land which is an inalienable constituent of any housing project. The person doing only the work of developing and constructing the building structure on the authority of the approval granted to the landowner cannot be said to be in the business of an undertaking developing and building housing projects, not only on account of not being the owner of the land, a necessary constituent of the housing project, but also on account of not having been granted the approval to execute the project in his own right, because that involves obligations that can be

discharged only by the person to whom the approval is granted. The case law relied upon are all distinguishable on facts and hence are not applicable to the present case.

16. In view of the discussions given above, I do not intend to interfere with the action of the AO in disallowing the claim of deduction under Section 80-IB(10), hence, the same is confirmed.

5. In some of the cases the CIT(A) has allowed the claim of the assessee and the Department is in appeal. Finding of the CIT(A) allowing the claim of the assessee in the case of M/s Churbhuja Developers in ITA No. 1328/Ahd/2006 is as under: The AO has rejected the claim of the appellant firm on the ground that the land on which development had been carried out is in the name of Shri Somabhai Ukabhai Mali and not in the name of the appellant firm. Further, the approval given by the local authority was not in the name of the appellant firm but in the name of original landowner. Further, the appellant firm has acted merely as a contractor as it has entered into construction agreements with the unit holders. The landowners have sold the pieces of land to the unit holders directly and the appellant has merely acted as a confirming party. There is no dispute that the appellant firm has fulfilled the remaining conditions for claiming the deduction under Section 80-IB(10) of the IT Act, 1961. It has been pointed out by the appellant's representative that as per the development agreement dt. 29th Dec, 2000, the appellant has to perform the following work: (i) To pay a consideration determined at Rs. 20 per sq. mtr. (Clause 1) (ii) To obtain all the permissions from the competent authority and to pay the necessary development charges and other charges to the local authority. (Clause 2).

(iii) To advertise the development of the project and to enroll the members/customers in the housing project, to receive money from them, to issue receipts to them and for that purpose to enter into the agreement for sale and for that purpose the landowner agrees to appear before Sub-Registrar and get the registration done in favour of the members. However, the responsibility shall be of the developer, (Clause 3) (iv) To collect the amount from members and to complete the undertakings given to them and the entire responsibility of managing

the customers/members is of the developer. And the landowner shall cooperate when required. (Clause 4) (v) To construct the houses as per the scheme and the entire expenditure for the same shall be incurred by the developer and for that purpose to appoint architect, engineers, contractors to execute the scheme and that such arrangement shall be done by the developer and for the execution of the scheme the possession of such property till the sale deeds are executed shall be with the developer and the landowner shall have no right to claim or complain. (Clause 5).

(vi) To procure the necessary construction material for construction of the scheme and if any construction material is under the regulation and control of the civil supply authorities, the landowner shall sign as instructed by the developer. (Clause 6) (vii) In the course of development, if any customer (member) desires to borrow funds/loans from any financial institution, the landowner agrees to execute the documents in the office of Sub-Registrar as required. (Clause 7) (viii) The landowner agrees to be a signatory in the sale deeds while the developer shall be a confirming party in all the deeds and documents to be done from time to time in favour of the purchasers.

(Clause 8) (ix) In the event that the landowner fails to execute and sign the deeds in favour of customers/members, the developer shall be entitled to obtain such rights and also recover any loss that may arise to him. (Clause 9) (x) All the taxes, charges, levies in relation to the land shall be the responsibility of the developer. (Clause 10) 6. As per this agreement, the landlord is entitled to the cost of land owned and not to any profit earned by the developer by execution of the said scheme. In Section 80-IB(10), there is no condition regarding the ownership of the land being developed. Further, there is no requirement in this Sub-section that the approval of housing project by a local authority should be in the name of the developer. Therefore, it cannot be held that for availing the deduction under Section 80-IB(10), ownership of land is an essential element and that the approval of the housing project by a local authority should be in the name of the person developing and building the same. As pointed out by the appellant in construing the benevolent provisions, the Court should adopt the construction which advances, fulfills and furthers the object of the Act rather than one which would

defeat the same and render the provision illusory. Further, the Court cannot go to the extent of reading something that is not stated in the provision. As pointed out by the appellant's representative the appellant as per the development agreement had obtained the actual possession of the land for execution of the agreement and had independent and exclusive right to enjoy the said land. The appellant firm had undertaken the entire development of the housing project. For the execution of the scheme it was to appoint the architect. The appellant firm was to appoint contractors for the execution of work and to make contracts with them. Further, it was the appellant who was required to obtain all the permissions from the competent authority. The appellant was responsible to enroll the members of the scheme, to receive money from them and for that purpose to enter into agreement. The landlord is not responsible for the moneys received by the developer from the members of the scheme. It was the responsibility of the developer to execute the sale deed after making construction as per approved plan. The developer is the confirming party on such sale deeds. These facts show that the appellant has not acted as an agent of the transferor but, in its own right. As per the development agreement, the landlord is only entitled to the cost of land. He is not entitled to any profit earned by the developer from the execution of the above scheme. Therefore, the profit derived by the appellant firm is from the developing and building of housing project approved by the Vadodara Municipal Corporation. The appellant firm, therefore, satisfies the conditions laid down under Section 80-IB(10) of the IT Act, 1961. Therefore, the AO was not justified in not allowing the deduction of Rs. 24,68,756 claimed under Section 80-IB(10) of the IT Act, 1961. The AO is directed to allow the deduction claimed under Section 80-IB(10) of the IT Act, 1961." 7. Aggrieved, the assessee came in second appeal before us. The leading arguments are advanced by Shri S.N. Soparkar. He submitted that (i) ownership of land on which housing project is developed and constructed is not a condition precedent for claiming the benefit under Section 80-IB(10) of the Act and (ii) in any case the development and construction agreements amply demonstrate that the assessee was the owner of the project for all practical purposes clearly revealing that landowners have agreed to get their own land developed through the assessee firm and also agreed that the assessee firm will make the members and collect the land consideration at the rate mentioned in the agreement. He referred

to in this connection the provisions of Gujarat Town Planning and Urban Development Act, 1976 (hereinafter referred to as the "GTP and UDA"), and submitted that there is no such requirement that ownership of land must be with the undertaking developing and building housing project. The provisions of Section 80-IB(10) of the Act, also nowhere states that the developer of housing project must be the owner of the land. The learned Counsel for the assessee has taken us to the legislative history of the provisions including the provisions of Section 80-IA(4F) of the Act, where initially the deduction was allowed to an undertaking engaged in developing and building housing project approved by a local authority prior to 1st April, 2000. He also submitted that the existing provisions of Section 80TB(10) relevant for the relevant assessment year nowhere speaks about the ownership of land for an undertaking engaged in developing and building housing projects. The learned Counsel for the assessee also relied on the various case law of the Supreme Court, High Courts and also of the Tribunal, namely, Aran Excello Foundations (P) Ltd. v. Asstt. CIT (2007) 108 TTJ (Chennai) 71, the Supreme Court decision in the case of CIT v. Vadilal Lallubhai and in the case of Federation of Andhra Pradesh Chambers of Commerce and Industry and Ors. v. State of Andhra Pradesh and Ors. , decision of Lucknow Bench, of the Tribunal in the case of Late Sir Padampat Singhania Through LR v. Dy. CWT (2004) 89 TTJ (Luck) 646, decision of Hyderabad Bench "A" in the case of Ocean Sparkle Ltd. v. Dy. CIT (2006) 99 TTJ (Hyd) 582, Pune Bench decision of Tribunal in the case of Nirmithi Construction v. Dy. CIT (2005) 95 TTJ (Pune) 1117, decisions of the Supreme Court in the case of CIT v. South Arcot District Co-operative Marketing Society Ltd. and in the case of CIT v. J.H. Gotla , decision of Bishan Das and Ors.

v. State of Punjab and Ors.

further addressed us on the disallowance of the claim on account of unutilized FSI and submitted that the Revenue has misunderstood the facts and wrongly proceeded to disallow the claim of the assessee on this ground. Shri J.P. Shah mainly adopted the arguments of Shri S.N. Soparakar. Shri U.B.S. Bhatti referred to the decision of the Supreme Court in the case of Pandian Chemicals Ltd. v. CIT to support the claim. Shri K.R. Dixit also referred to the decision of Punjab & Haryana High Court in the case of B.M. Parmar v. CIT and the Supreme Court

decision in the case of CIT v. Strawboard Manufacturing Co. Ltd. . He also referred to the decision of Kerala High Court in the case of CIT v. N.P. Mathew and Ors. and Calcutta High Court 8. On the other hand, the learned Departmental Representative, Shri R.K. Panda, submitted that only the landowner in whose name the land stands and who is the owner of the project will get the deduction under Section 80-IB(10) of the Act and not the developer who is a contractor.

In this case, the land is mainly purchased by the co-operative societies which is given to develop for construction of flats. It is a fact that the land is never registered in the name of developer and even the completion certificate is given in the name of the landowner and not the developer. According to the learned Departmental Representative the acquisition of land legally as well as physically is intrinsic to an undertaking developing and building housing projects is reinforced by the mechanism of approval by the local authorities. He, therefore, submitted that since all the required permissions from the local authorities were also in the names of landowners, and even the completion certificate is also issued to the landowner alone, the assessee is not eligible for deduction under Section 80-IB(10) of the Act. Transfer of land through development agreement is not a transfer of ownership much less a transfer of approval. It gives possession not as a prelude to, or in connection with transfer of the title, but, for the limited purposes to carry out development and construction work.

The learned Departmental Representative relied on the decision of the Supreme Court in the case of V.S.M.R. Jagadishchandran (Deed) By LRs v. CIT and decision in the case of Gujarat Industrial Development Corporation and Ors. v. CIT in support of his submissions. He also referred to the decision of Tribunal Pune Bench, in Om Engineers & Builders v. ITO (2006) 104 TTJ (Pune) 604 and also referred to the decision of Tribunal Pune Bench reported at (2005) 95 TTJ (Pune) 1117 (supra).

9. We have heard the rival contentions and gone through the facts and circumstances of the case. We have also gone through the orders of lower authorities as well as the paper book filed by the learned Counsel for the assessee.

10. In the most common mode of development of real estate by the developers, the owners of land do not desire to develop the land and they sell the land to a developer. It is the obligation of the developer to develop the land, and if necessary, to get agricultural land converted into non-agricultural land by the change of user, appoint the architects to prepare the building plans, get them approved with the local authority and to construct the houses in the form of tenements and flats. The developer would carry out the construction on his own, namely, carry out all necessary statutory formalities for construction, buy material for construction, employ labour or an agency which would supply labourers and thereupon complete the construction.

The developer would then sell the houses to the prospective buyers. The developer would buy land and get it transferred in his name even before the plans are placed.

However, the other mode in many cases is that land is not purchased at that stage by executing deed of conveyance, i.e. sale deed. This is because of variety of reasons, namely, because such conveyance would entail payment of stamp duty, because of litigation, prohibition against execution of conveyance deed immediately, etc. In some cases, the land may be conveyed directly in favour of co-operative housing societies or non-trading corporations or developers. Therefore, if the land is conveyed to developer, what the developer does is that he enters into an agreement titled as development agreement with the landowner. The development agreement effectively is an agreement of sale under which the landowner hands over the possession to the developer, which entitles developer to develop the property entirely at his choice, convenience and discretion. By such development agreement, the price on which the land would be sold, is fixed. The agreement would also specify that the landowner would be entitled to receive his consideration either immediately or over a fixed period, irrespective of whether or not the land is actually developed by the developer. The landowner gives all his rights over the land and gives full authority to the developer to enjoy the land in the manner of his choice. The agreement would also specifically authorize the developer to develop the land, construct tenements thereon, book members and handover possession to one or more allottees. For all purposes, therefore, the

landowner extinguishes his interest in this land in favour of developer on execution of this development agreement.

11. In the case of the present assessee land situated at Vadodara, i.e.

area comprising of the city of Baroda and around it, is declared as urban development area within the meaning of Section 2(xxix) of the GTP & UDA and the constructions carried out in and around Vadodara are governed by the provisions of the GTP & UDA. The provisions of Section 26 of the GTP & UDA restrict everyone from carrying on development/construction over any land without the permission of the appropriate authority, i.e., Vadodara Urban Development Authority (VUDA), Section 27 prescribes that an application for development is to be made, importantly, such application, can be made by "any person...intending to carry out any development...in or over any land...." It does not refer only to an owner of the land. That apart, the definition of the term "owner" as given in Section 2(xviii) of the GTP & UDA clearly says that anyone, who develops the land on his own account or for the benefit of any other person or as a joint trustee, guardian, manager, etc., is to be treated as an owner. Sec. 29 of GTP & UDA authorizes VUDA to grant or refuse permission for development. In terms of the powers prescribed under Section 118 of GTP & UDA, the State Government has notified rules, viz., Gujarat Town Planning and Urban Development Rules, 1979 (hereinafter referred to as "GTP & UDR").

Rule 9 thereof prescribes application for development permission under Section 27 to be in Form C and that permission to be granted under Section 29 to be in Form D. On looking at Form C, it is clear that such an application can be made by anyone, not necessarily "owner".

Similarly, permission for development could be granted to whoever has applied for the permission not necessarily only the owner.

12. We may also refer to at this stage, the "General Development Control Regulations" (GDCR) as notified by VUDA in pursuance of provisions of Section 12(2)(m) and Section 13(2)(c) of the TP Act which govern the activity of construction in and around the city of Vadodara.

Clause 2 of GDCR gives definitions. The term "owner" in Clause 2.32 includes "developers". Therefore, in GDCR whenever there is a reference to the term "owner" it would always include "developers developing any property". Clause 3 of GDCR prescribes procedure for acquiring development permission. Application has to be made in Form No. 1 which can be filed by anyone including "developer". Thus, a "developer" has a right to apply for development permission and to carry on all construction activities. Clause 11 prescribes conditions for development of land and clearly contemplates grant of development permission not only to "owner" but, also to a person who has a right to develop the land. Regulation 23 shows that it applies to the new construction, as distinguished from the applicability to the person applying for construction. In other words, the developer carries out development activity as to comply with the regulations whether or not he is the "owner". This becomes further clear when one examines Clause 25, which pertains to penalties. Finally, when the construction is completed the application for occupancy permission has to be made in Form No. 7 pursuant to reg. No. 6.2(b) and that building completion certificate is given by the authority in Form No. 10 pursuant to reg.

No. 7 in relation to development. Therefore, what is material is the development of the real estate and not, who has carried out the same.

13. It is a fact that the land was not registered in its name. It is also true that the assessee had the approval granted by local authority, i.e. BMC which stands in the name of the owner of the land.

But, on perusal of the development and construction agreement it is very clear that the landowners have agreed to get their land developed through the assessee firm for construction of housing project. From the translated copy of approval of local authority, i.e. BMC, dt. 17th July, 2000, we find that it is in the name of Shri Ghanshyambhap A.Patel and others through power of attorney holder Mahendrabhai A. Patel and in this approval letter, landowner is shown as the applicant. The relevant clause Nos. 1 and 2 of the 'Agreement to sell', may now be looked into to find out what is the exact nature of the transaction.

The relevant clause reads as under: (1) The above-referred land in schedule is agreed to be sold by us, party of the third part to party of the first part at the rate of per sq. ft. at Rs. 100 and today and you party of the first part has jointly paid to party of the third part Rs. 11,000 (Rupees eleven thousands only) by cash, Subhanpura, Baroda.

(2) The abovesaid amount paid as referred in para 1, you party of the first part has to pay to party of the third part in four monthly instalments within eighteen months. During this period at the time of paying money the name of members that you suggest to be incorporated in agreement to sale/sale deed by part with internal understanding for which the seller will give consent.

As the land is covered by the laws of Urban Land Ceiling Act, rules and regulations thereunder the party of the second part. Before competent authority and Addl. Collector, Baroda, has put the said land and has declared on dt. June, 1993. The said land to be kept as freehold. The said land layout plan, development permission to construct by the order dt. 14th Jan., 1996, No. L/152/1995-96 the Baroda Deputy City Development Authority and permission to construct is granted by Baroda Municipal Corporation.

The owners of the land, executors of agreement to sale, by dt. 7th Sept., 1981 has passed the deed of agreement to sale favouring consenting party. Therefore, they are taken as consenting party, in present agreement to sale. At the time of making agreement to sale we, landowners, the executors have received full amount towards the sale price of the land and, therefore, the party of third part is made consenting party and, therefore, the amount of sale price is to be given to the consenting party by the purchaser as per this agreement to sale.

14. The relevant terms and conditions clearly state that the second party is the owners of the land. The agreement for development of the housing project and construction dt. 18th May, 2000 described in the schedule and the land is in their names in the Government records. The relevant Clauses. 1, 2, 3 and 4, read as under: Who shall be hereinafter in this present agreement of Development of Housing Project and Construction termed as The party of the third part or you the said firm or developer builder in the meaning and context of the said term includes

all the present and future partners/partners from time to time of the said firm of the party of the third part, who are alive, and heirs, successors, guardians, etc. of everybody.

1. Whereas the party of the second part the confirming party are the original owners of the land described in schedule below and is on their names in Government record.

2. The Party of the second part the confirming party as landlords had executed an agreement of sale for the land described in schedule below in favour of the party of the first part on 7th Sept., 1981 @ Rs. 18 per sq. ft. and subject to the other conditions mentioned therein. Accordingly, the party of the first part as decided full consideration price is paid to the second part the confirming party i.e. to landlords and, therefore, landlords registered sale deed/the first part or nominee/s of the party of the first part are in actual possession of the land described.

3. The Party of the third part are connected with the construction of business since many years and have experience of constructing residential houses.

4. With the consent of the party of the first and second part, The party of the third part as a developer and builder wants to do a project/scheme of constructing residential houses having area less than 1,500 sq. ft. for the middle class society.

15. On perusal of Clause 11 of these agreements we find that with the consent of the party of the first and second parts, the rights and authorities are given to the third party, as a developer-cum-builder.

The Sub-clauses. (8) and (9) to Clause 11 elaborate that the developer-cum-builder has to take all the proceedings at Government, semi-Government, Municipal Corporation office and in legal Court and at other places on behalf of the party of the first and second part. All necessary applications and written statements, replies and in the forms all that is to be done by developer-cum-building contractor. The relevant Sub-clauses. (8) and (9) read as under: 8. That the said developer-cum-building contractor in order to complete the scheme in order step by step but in prescribed time period, The party of the first and second

part and all the members desirous in joining in the scheme developer-cum-building contractor whenever and wherever they need the signatures and admissions, they shall have to give that to the developer-cum-building contractor and in special circumstances developer-cum-building contractor in order to complete the scheme in order step by step but in prescribed time period, shall be entitled to receive general power of attorney from the party of the first and second part.

9. In order to complete the scheme as per arrangement plan and in prescribed time period, developer-cum-building contractor has to take all the proceedings at Government and semi-Government and Municipal Corporation office and in legal Courts and at other places on behalf of the party of the first and second part on necessary applications and written statements, replies and in the forms all that is to be done by developer-cum-building contractor and for that hereby the authority and powers are given to him in spite of that in future, if any specific power of attorney is to be obtained at that time the party of the first and second part shall have to execute that in favour of developer-cum-building contractor.

16. By Clause 14 of this agreement the possession is to be with the developer-cum-building contractor, i.e. assessee firm and it reads as under: 14. The land described in schedule below and the construction done on it, its actual possession shall be with developer-cum-building contractor till the completion of this scheme and moreover till the total implementation of this agreement on the said land and the construction over it there shall be a contractual lien of the developer-cum-building contractor.

17. Vide Clause No. 16 of this agreement the parties of the first and second part of this agreement have handed over all the responsibilities of the scheme to the developer-cum-building contractor. It reads as under: 16. The party of the first and second part have handed over all the responsibilities of the scheme to the developer-cum-building contractor so at present to the party of the first part as per rules and regulations he is getting FSI, but, in future if changes take place in rules and regulation of FSI in such circumstances other than the present scheme on the land if special construction is allowed then for such additional work other than total construction made, as per rules and regulations by getting passed the plans from

V.M.C., Vadodara to do the construction all the rights and authorities shall be with developer-cum-building contractor and, thereafter, also whatever F.S.I, rights shall remain that also as per this agreement shall be with the party of the third part.

18. From the clauses of the development and construction agreements as well as agreement for sale, both dt. 18th May, 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 a consideration payable within a stipulated time; that the assessee had been put in possession of the land on the terms and conditions as mentioned in these two agreements; that the assessee firm has also paid consideration of Rs. 56 lacs during the two financial years; 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 landowners 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 developmental charges to various regulating agencies, i.e. VUDA, BMC and GEB (Gujarat Electricity Board), etc.; and that these expenses are incurred by the assessee firm and the AO has brought out the complete details year-wise in his assessment orders at page No. 5 reading as

under:-----	Sr. No.
Particulars	Financial
Amount-----	1.

VMC charges paid to Vadodara Municipal 2000-01 65,5322.

VMC charges paid to Vadodara Municipal 2001-02 31,1163.

VUDA charges paid to Vadodara Development 2000-01 46,5084.

Electricity charges paid to GEB for getting 2000-01	
1,99,944-----	19.

The assessee commenced the work to develop which included the development of

sites, laying roads within the housing complex, providing for compound walls of the housing complex, street lights, drainage, etc., that simultaneously the construction commenced the work of the housing work; that the cost of the entire development and the construction is substantially made out by the assessee firm initially and partially recovered from the customers who are desirous to purchase any residential house i.e. the prospective buyers; and that the size of plot on which the project is developed is, definitely, in excess of one acre and the size of each residential house is less than 1,500 sq. ft.

20. On these undisputed facts we have to examine the provisions of the Section 80-IB(10) of the Act. Before discussing the provisions appearing in the impugned years, it would be relevant to have a look at the legislative history of the provision. The deduction for housing project was introduced for the first time in asst. yr. 1999-2000 by inserting Sub-section (4F) in Section 80-IA of the Act and the deduction was as per provisions of Section 80-IA(1) in respect of any profits and gains of such undertaking. The said Section 80-IA(4F) reads as under: (4F) This section applies to an undertaking, engaged in developing and building housing projects approved by a local authority subject to the condition that the size of the plot of land has a minimum area of one acre, and the residential unit has a built up area not exceeding one thousand square feet : Provided that the undertaking commences development and construction of the housing project on or after the 1st day of October, 1998 and completes the same before the 31st day of March, 2001.

21. On a close reading of this provision, it would be apparent that it applied to an undertaking which was engaged in developing and building housing projects approved by a local authority and the deduction was subject to the conditions that (i) the size of the plot of land was a minimum area of one acre, and the residential unit has a built up area not exceeding 1,000 sq. ft; and (ii) the undertaking commenced development and construction of the housing project on or after 1st Oct., 1998, and completed the same before 31st March, 2001.

22. Section 80-IA was later split into and spread in two Sections 80-IA and 80-IB by the Finance Act, 1999 w.e.f. 1st April 2000. The housing project fell in Section

80-IB and forms part of Sub-section (10) of Section 80-IB. It grants deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings. The relevant provision brought out reads as under: 80-IB Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.

(10) The amount of profits in case of an undertaking developing and building housing projects approved by a local authority, shall be hundred per cent of the profits derived in any 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 the same before the 31st day of March, 2001; (b) the project is on the size of a plot of land which has minimum area of one acre; and (c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place.

23. For enacting this provision, the Notes on Clauses to the Finance Bill, 1999 have explained that the provision also seeks to provide that for approved housing projects the profits which are fully deductible, the built-up area in regions other than outside twenty-five kms of municipal limits of Delhi and Mumbai, does not exceed one thousand five hundred square feet.

24. Further, the Memo contained in Finance Bill, 1999 has explained the provisions brought by the legislature w.e.f. 1st April, 2000 and the same reads as under : Liberalization of tax holiday to approved housing projects. Under Section 80-IA of the IT Act, profits of approved housing projects where the development and construction commences on or after 1st Oct., 1998 and is completed by 31st March, 2001 are fully deductible. The conditions necessary for claiming the benefit are that the approved housing project should be on minimum area of one acre and should have dwelling units with a maximum built-up area of 1,000 sq. ft. It is proposed to modify the existing benefits to provide that in areas other than those falling in and within 25 kms.

from the municipal limits of Delhi and Mumbai, the built-up area of dwelling units may be upto a maximum limit of 1,500 sq. ft. instead of 1,000 sq. ft. at present to make them entitled for benefit. The built-up area for areas falling in Delhi and Mumbai and within 25 kms. of the municipal limits of both, however, shall remain the same.

The proposed amendment will take effect from 1st April, 2000, and will, accordingly, apply in relation to the asst. yr. 2000-01 and subsequent years.

25. The provisions of Section 80-IB(10) thus are sought to provide that for approved housing project, the profits are fully deductible if the project has the built-up area for the cities of Delhi and Mumbai, and the area within 25 kms from the municipal limit thereof does not exceed 1,000 sq. ft. and for other places the built up area of residential unit does not exceed 1,500 sq. ft. A provision is also made whereby any undertaking of an Indian company, which is entitled to deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger (a) no deduction to be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place ; and (b) the provisions of this section to apply to the amalgamated or resulting company as they would have applied to the amalgamating or demerged company as if the amalgamation or demerger had not taken place.

26. The Sub-section (10) relating to housing project was amended from time to time. Firstly, by Finance Act, 2000, w.e.f. 1st April, 2000 extending the outer limit for completion of the housing project on or before 31st March, 2002 as against 31st March, 2001 originally enacted.

This Sub-section was again amended by Finance Act, 2003 removing the time-limit for completion of the project meaning thereby that for the asst. yrs. 2002-03, 2003-04 and 2004-05, the assessment years with which we are concerned, there was no outer time-limit for completion of the project. There have been certain further amendments in this section by Finance (No. 2) Act, 2004 w.e.f. 1st April, 2005, but we are not concerned with these amendments insofar as all these

appeals are concerned. Therefore, we are not dealing with the same.

27. A bare reading of these provisions of Section 80-IB(10), as they stood in the years under consideration, the requirements for claiming deduction for housing projects are that (i) there must be an undertaking developing and building housing project; (ii) such housing project is approved by the local authority; (iii) the development and construction of housing project has commenced on or after 1st Oct., 1998; (iv) the housing project is on a size of a plot of land which has minimum area of one acre; and (v) the residential unit developed and built has a built up area of 1,000 sq. ft. if it is situated in Delhi and Mumbai or within 25 kms of municipal limit of these cities and 1,500 sq. ft. at any other place. There is no other condition, which is to be complied by an assessee for claiming the deduction on profits of the housing project.

28. "The contention of the Revenue authorities that to claim deduction under Section 80-IB(10), there is a condition precedent that the assessee must be owner of the land on which housing project is constructed has no force. We do not find any such condition as appearing in the provisions of the section extracted above. A plain reading of Sub-section (10) of Section 80-IB reveals and makes it evident that there must be an undertaking developing and building a housing project as approved by a local authority. It does not have any further condition that such development and building of the housing project should also be on a land owned by an assessee undertaking. It might be true that the land belongs to the person who has entered into an agreement with the assessee to develop and build housing project but on a perusal of the agreement as narrated above, it is evident that the development and building work has been carried out by the assessee in pursuance of a tripartite agreement and it is not by the land-owners.

Therefore, the mere fact that the landowner and the undertaking developing and building housing project, are two different entities would not make any difference. The deduction would be eligible to the person who is developing and building housing project and not to the mere owner thereof.

29. It is also the case of the Revenue that the assessee was a mere contractor developing and building housing project and therefore, it could not be a developer.

We fail to understand as to how such a situation could emerge. A person who enters into a contract with another person is no doubt a contractor. Having entered into agreements with landowners for development and building the housing project, assessee was obviously a contractor but it does not derogate the assessee for being a developer, as well. The term contractor is not essentially contradictory to the term developer. As stated above, it is the undertaking that develops or builds the housing project that is entitled to deduction irrespective of the fact whether that it is the owner or not or whether it is the contractor thereof. The requirement for claiming deduction is that such an undertaking must develop and build housing project, be it on their own land or on the land of others and for which a tripartite agreement has been entered into for development and building housing project; or be the assessee a contractor for developing and building housing project or an owner of the land.

30. What is the meaning of the term develop, developer, developing, development, we can find the answer in certain dictionaries, including the Law Dictionary.

(a) The Webster's Encyclopedia Unabridged Dictionary of the English Language gives following meanings of the term 'developer' as: 2. A person who invests in and develops the urban or suburban potentialities of real estate.

(b) Oxford Advanced Learners Dictionary of Current English Fourth Indian edition gives meaning of the term 'developer' as person or company that develops land.

(c) Random House Dictionary of the English Language, the following definitions can be found: a. To bring out the capabilities or possibilities of; bring to a more advanced or effective state.

b. Synonym: Expansion, elaboration, growth, evolution, unfolding, maturing, maturation.

d. To convert (a tract of land) for specific purpose, as by building extensively (e) Law Lexicon Dictionary, the following definitions could be seen : a. To act, process or result of development or growing or causing to grow; the state of being developed.

31. The Supreme Court in the case of Gujarat Industrial Development and Ors. (supra), considering the meaning of "developer" held that the word "Development" appearing in the provisions should be understood in its wider sense and, therefore, granted exemption even though the Gujarat Industrial Development Corporation was engaged in the industrial development. The development means the realization of potentialities of land or territory by building or mining. Accordingly, it can be safely said that a person who undertakes to develop real estate by developing and constructing a housing project is an eligible undertaking; developing and building of housing projects within the meaning of Section 80-IB(10) of the Act. In the present case in hand, the landowner has not made any conscious attempt to develop the property except ensuring their rights as landowner so that the sale value of the land could be realized to them as per the terms of 'Agreement to Sale' and the 'Development Agreement'. The landowners, no doubt, have not thrown themselves into development of property. It is only the assessee who is developing the property. Throwing itself into the business of development and building of housing projects by taking all risks associated with the business by engaging architects, structural consultants, designing and planning of the housing schemes, payment of development charges, obtaining necessary permissions, approving plans, hiring machinery and equipments, hiring engineers, appointing contractors, etc. No doubt, the permission has been obtained in the name of the registered landowners, but the same have been obtained by the assessee firm through its partners who are holding power of attorney of the respective landowners. It is a fact that the assessee is a 'developer' and not a 'contractor' as held by the lower authorities. The developer is not working on remuneration for the landowners, but developer is working for himself in order to exploit the potential of its business in his own interest and, therefore, opted for all business risks associated with the business of development of real estate including developing and building of housing projects. As per the provisions of Section 2(1)(g) of Regulation of Employment and Conditions of Service Act (27 of 1996), the term 'Contractor' means a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment; and includes a sub-contractor.

32. In these circumstances, in our opinion, the assessee is entitled to deduction under Section 80-IB(10) as it had developed and built the housing project; it had started construction after 1 day of April 1998; the project is on the size of a plot of land which has a minimum area of one acre and the maximum built-up area of the residential units is not more than 1,500 sq. ft. the property being situated in Baroda, a city other than Delhi and Mumbai.

33. It may also be born in mind that deduction is not exclusively to an assessee but to an undertaking developing and building housing project, be it developed as a contractor or as an owner. This fact is evident on the bare reading of Sub-section (1) of Section 80-IB, Sub-section (2) of Section 80-IB, which provides that "this section applies to an industrial undertaking which fulfills all the following conditions viz..." and Sub-section (12) which allows the deduction to the amended [sic) or resulting company in case of amalgamation or demerger of the original undertaking which had started developing and building the housing project. For the sake of convenience, Sub-section (12) of Section 80-IB is reproduced hereunder: 80-IB(12) Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger.

(a) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and (b) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

34. Even if that is so required, the assessee in the present case can also be said to be the owner of the land as it had made part payment to the landowners during the financial years 2000-01 and 2001-02 for an amount of Rs. 56 lacs, and taken the possession of the land for development and building the housing project and satisfy that condition as well of being the owner of the land in view of provisions of Section 2(47)(v) of the Act. When the assessee has taken on the possession of

immovable property or retained it in part performance of a contract of a nature referred to in Section 53A of the Transfer of Property Act, 1882 it amounts to transfer under Section 2(47)(v), which reads as under: (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or 35. Section 53A of the Transfer of Property Act, 1882 referred to in the aforesaid section of the IT Act, reads as under: 53A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights or a transferee for consideration who has no notice of the contract or of the part performance thereof.

36. In view of above provisions of the Transfer of Property Act, vis-a-vis, the IT Act to get the correct import of Section 80-IB(10) of the Act we have to read along with Section 80-IB(1) of the Act which also does not provide for any condition that the assessee should be owner of the land. The relevant provisions of Sub-section (1) of Section 80-IB, reads as under: 80-IB. 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) and (11A) (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.

37. The learned Departmental Representative relied on the decision of the Supreme Court in the case of V.S.M.R. Jagadishchandran (Deed) By LRs v. CIT , observing at page No. 243 that "It has been held that where a mortgage was created by the previous owner during his time and the same was subsisting on the date of his death, the successor obtains only the mortgagor's interest in the property and by discharging the mortgage debt he acquires the mortgagee's interest in the property and therefore the amount paid to clear off the mortgage is the cost of acquisition of the mortgagee's interest in the property which is deductible as cost of acquisition under Section 48 of the Act.

In the present case, we find that the mortgage was created by the assessee himself. It is not a case where the property had been mortgaged by the previous owner and the assessee had acquired only the mortgagor's interest in the property mortgaged and by clearing the same he had acquired the interest of the mortgagee in the said property. The questions raised by the assessee in the application submitted under Section 256(2) of the Act do not, therefore, raise any arguable question of law and the said application was rightly rejected by the High Court. In the circumstances, even though we are unable to agree with the reasons given in the impugned order, we are in agreement with the order of the High Court dismissing the application filed by the assessee under Section 256(2) of the Act."

38. The argument is totally misconceived as in the present case, the assessee has performed his part of the contract in regard to 'Agreement to sale' and 'Development agreement' and paid part of consideration to perform his part and carried out development activities by constructing a housing project as per agreement. This being a tri-party agreement, i.e. the development agreement which has passed on a valid and rightful title to the prospective buyers, in no way it can be said that facts of case before the Supreme Court would apply to the present case.

39. We may refer to the provisions of Section 10(20A) of the IT Act providing that : "Any income of an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both." The Supreme Court while interpreting the provisions of Section 10(20A) of the Act, the purpose of which is almost similar to the present Section 80-IB, held in the case of Gujarat Industrial Development Corporation and Ors. v. CIT (supra), at page No. 417 as under: Any income falling within the ambit of the said clause would automatically slip out of the exigibility under, the IT Act. The clause pertains to any income of an authority constituted by or under any enacted law. This first limb of the clause is squarely available to the corporation as it has been constituted under the Gujarat Act. The second limb of the clause consists of two alternatives, of which the first is that the authority constituted by law should be for dealing with the need to provide housing accommodation. That alternative is obviously not available to the appellant corporation as nobody has a case that the appellant corporation has anything to do with the obligation to provide housing accommodation. It is the second alternative in the clause under which the appellant seeks shelter to be absolved from the liability to pay income-tax. As per that alternative, if the authority is constituted for the purpose of planning or development or improvement of any city or town or village or a combination of them, the income of such authority is not exigible to income-tax. *Tamil Nadu Civil Supplies Corpn. Ltd. v. CIT* referred to by the learned Departmental The assessee before it had purchased certain houses from the housing board and had made part payment thereof. It had acquired possession of the houses but the deed of conveyance was not executed until after the financial year in question. Even so, the assessee's claim for depreciation of the buildings, which it had used for the purpose of its business, was upheld on the basis that it had acquired dominion over the buildings.

We will assume the correctness of the judgment but on the facts found, it is not possible to reach the conclusion that the assessee had acquired dominion over the mills in question. There is nothing on the record which indicates this nor is that the finding of the Tribunal.

41. The Supreme Court in this case has considered the issue and finally found that there is nothing on record which indicated that the assessee had acquired dominion over the mills in question on which depreciation was claimed in order to (sic) the findings of the Tribunal available.

In view of these facts, the Supreme Court has dismissed the appeal of the assessee.

42. We may refer to decisions referred to by the learned Counsel for the assessee in the case of Supreme Court in the case of Mysore Minerals Ltd. v. CIT , wherein by relying on the CIT v. Podar Cement (P) Ltd. , the Supreme Court has elaborately discussed and defined the word "owner" and finally held as under: Section 32 of the IT Act confers a benefit on the assessee. The provision should be so interpreted and the words used therein should be assigned such meaning as would enable the assessee securing the benefit intended to be given by the legislature to the assessee. It is also well-settled that where there are two possible interpretations of a taxing provision the one which is favourable to the assessee should be preferred.

What is ownership? The terms "own", "ownership", "owned", are generic and relative terms. They have a wide and also a narrow connotation, The meaning would depend on the context in which the terms are used Black's Law Dictionary (6th edition), defines 'owner' as under: Owner : The person in whom is vested the ownership, dominion, or title of property ; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he prevented by some agreement or covenant which restrains his right.

The term is however, a nomen generalissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied. The primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property, but the term also includes one having a possessory right to land or the person occupying or cultivating it.

The term 'owner' is used to indicate a person in whom one or more interests are vested for his own benefit....

In the same dictionary, the term 'ownership' has been defined to mean, inter alia, a 'collection of rights to use and enjoy property, including right to transmit it to others.... The right of one or more persons to possess and use a thing to the exclusion of others.

The right by which a thing belongs to someone in particular to the exclusion of all other persons. The exclusive right of possession, enjoyment and disposal; involving as an essential attribute the right to control, handle, and dispose.' The position, therefore, seems to be that the idea of ownership of land is essentially one of the 'better right' to be in possession and to obtain it, whereas, with chattels the concept is a more absolute one. Actual possession implies a right to retain it until the contrary is proved, and to that extent a possessor is presumed to be owner.

Stroud's Judicial Dictionary gives several definitions and illustrations of ownership. One such definition is that the 'owner' or 'proprietor' of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct of it; e.g., a lessee is, during the term, the owner of the property demised.

'Owner' applies 'to every person in possession or receipt either of the whole, or of any part, of the rents or profits of any land or tenement; or in the occupation of such land or tenement, other than as a tenant from year to year or for any less term or as a tenant at will. In *State of U.P. v. Renuagar Power Company* (1991) 70 Comp. Cos.

127, 149 (SC), it was held that the word 'own' is a generic term, embracing within itself several gradations of title, dependent on the circumstances, and it does not necessarily mean ownership in fee simple; it means, to possess, to have or hold as property. In *CIT v. Podar Cement (P) Ltd.* (supra), the question which came up for consideration before this Court was whether the rental income from the house property which had come to vest in the assessee, but as to which the assessee

was not legal owner for want of deed of title, was liable to be assessed as income from house property or as income from other sources. To be assessable as income from house property within the meaning of Section 22 of the Act, the property should be such 'of which the assessee is the owner'. This Court upon a juristic analysis of the underlying scheme of the Act and resorting to contextual and purposive interpretation, also having reviewed several conflicting decisions of different High Courts, held that the liability to be assessed was fixed on a person who receives or is entitled to receive the income from the property in his own right. Vide para 55, this Court has held: We are conscious of the settled position that under the common law, 'owner' means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act, etc. But, in the context of Section 22 of the IT Act, having regard to the ground realities and further having regard to the object of the IT Act, namely, to tax the income', we are of the view, 'owner' is a person who is entitled to receive income from the property in his own right. In *R.B. Jodha Mal Kuthiala v. CIT*, it was held for the purpose of Section 9 of the Indian IT Act, 1922, that the owner must be the person who can exercise the rights of the owner, not on behalf of the owner but in his own right.

We may usefully extract and reproduce the following classic statement of law from *Perry v. Clissold* (1907) AC 73 (PC) quoted with approval in *Nair Service Society Ltd. v. K.C. Alexander* : It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title. *CIT v. Podar Cement (P) Ltd.* (supra), is under the IT Act and has to be taken as a trend-setter in the concept of ownership. Assistance from the law laid down therein can be taken for finding out the meaning of the term 'owned' as occurring in Section 32(1) of the Act.

In our opinion, the term 'owned' as occurring in Section 32(1) of the IT Act, 1961, must be assigned a wider meaning. Anyone in possession of property in his own

title exercising such dominion over the property as would enable others being excluded therefrom and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title may not have been executed and registered as contemplated by the Transfer of Property Act, the Registration Act, etc. 'Building owned by the assessee' the expression as occurring in Section 32(1) of the IT Act means the person who having acquired possession over the building in his own right uses the same for the purposes of the business or profession though a legal title has not been conveyed to him consistently with the requirements of laws such as the Transfer of Property Act and the Registration Act, etc., but nevertheless is entitled to hold the property to the exclusion of all others.

43. In view of decision of the Supreme Court in the case of Mysore Minerals Ltd. (supra), wherein the term "owned" in Section 32 has been given a wider meaning by holding that if an assessee was in possession of a property and had acquired dominion over it to the exclusion of others, he would be entitled depreciation under Section 32 irrespective of the legal title. In the present case the 'Development agreement' and 'Agreement to sale' the undertaking developing and building housing projects and claiming deduction of profits from such housing projects, there is, definitely, a dominion of the developer over the land to the exclusion of others inasmuch as possession of the land is given to the developer by the land owners to carry out the construction activity of the housing project. The assessee developer has complied with all the conditions as provided under Section 80-IB(10) of the Act, so as to claim deduction. The assessee has also passed on the part consideration for acquiring the land through an 'Agreement to sale' and in view of the provisions of Section 2(47) r/w Section 53A of the Transfer of Property Act, 1882, the assessee has completely performed his part of the contract and developed the housing project and transferred the flats/tenements to the buyers in view of 'Agreement to sale' as well as 'Development agreement'. It shows that the assessee was in full possession of the land for the development of housing project and has carried out all the activities of a complete housing project by taking all risks associated with this business. The assessee is engaged in complete infrastructure including engaging architects, structural consultants, designing and planning of the housing schemes, payment of development charges, obtaining

necessary permissions, on behalf of the landowners, got the plans approved, hiring of machinery and equipments, hiring engineers, appointing contractors, etc.

44. As. discussed above and in view of the case law of the Supreme Court in the case of Mysore Minerals Ltd. (supra), wherein it has been categorically observed as regards to ownership that anyone in possession of property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title might not have been executed and registered as contemplated by the Transfer of Property Act, the Registration Act, etc. In the present case before us, by virtue of 'Agreement to sale' and 'Development agreement', the assessee has acquired dominion over the land to the exclusion of others and he has completed the project on terms and conditions laid down under Section 80-IB(10) of the Act, to claim deduction on the profit derived from construction and development of residential housing project. There is no explicit condition enumerated in Section 80-IB(10) of the Act as regards to requirement of ownership for the claim of deduction. In view of above facts and circumstances of the case as well as legal proposition laid down by the Supreme Court in the case of Mysore Minerals Ltd. (supra), we hold that the assessee is entitled for claim of deduction on the profits derived from construction and development of residential housing project.

45. Therefore,, looked at from any angle, we are of the considered opinion, that to claim deduction for developing and building housing project, it is not necessary that assessee must be an owner of the land and it would be sufficient if he has an undertaking, to develop and build housing project. The assessee is also the owner of the project, though the title does not vest in it.

46. We may now briefly discuss certain cases referred to by the respective counsel at the time of hearing. In the case Arun Excello Foundations (P) Ltd. v. Asstt. CIT (supra) the conditions mentioned in this provision have elaborately been discussed by the Chennai Bench "A" in the above case (supra). There is no condition as regards to ownership in the provisions of Section 80-IB(10) of the Act.

47. The Supreme Court in the case of CIT v. Vadilal Lallubhai (supra) has observed that nothing more than what is stated in the statute can be read and added to find out a meaning of the provision. As the requirement of ownership is not there in the Section 80-IB(10), it cannot be read into it for rejecting the claim of the deduction. Federation of Andhra Pradesh Chambers of Commerce & Industry and Ors. v. State of Andhra Pradesh and Ors.

We are in no doubt whatever, therefore, that it is only land which is actually in use for an industrial purpose as defined in the said Act that can be assessed to non-agricultural assessment at the rate specified for land used for industrial purposes. The wider meaning given to the word 'used' in the judgment under challenge is untenable. Having regard to the fact that the said Act is a taxing statute, no Court is justified in imputing to the legislature an intention that it has not clearly expressed in the language it has employed.

49. In this case also, the Supreme Court has very clearly held that no Court is justified in imputing legislature an intention that it has not clearly expressed in the language it has employed. In the present case, there is no such condition as regards to ownership and this case also applies in favour of assessee.

50. The Tribunal, Lucknow Bench, in the case of Late Sir Padampat Singhania Through LR v. Dy. CWT (supra) has observed that the conditions as enunciated in a particular provision are to be interpreted strictly as per the provisions of law.

51. The Tribunal, Hyderabad Bench "A", in the case of Ocean Sparkle Ltd. v. Dy. CIT (supra) held that "Section 80-IA(4) does not provide that the infrastructure facility should be owned either by the enterprise developing the infrastructure facility or by the enterprise operating and maintaining the said facility. Proviso aims at granting deduction to enterprises engaged in the operation and maintenance of the infrastructure facility on behalf of the developers and not to the owners of the facility. Further, the ownership of impugned infrastructure facilities, viz., ports, does not even vest with the developers thereof, since waterfront is the sovereign right of the Government. Under the said circumstances, going by the CIT(A)'s contention would mean that deduction under Section 80-IA(4) cannot be claimed either by the developer or by the enterprise carrying on its operation and

maintenance since none of them owns the infrastructure facility. Such an interpretation would defeat the very purpose of granting deduction to enterprises engaged in developing, or operating and maintaining a port infrastructure. Confirmations from the counter-parties to the agreements have been filed admitting that the services rendered by the assessee company are essentially in the nature of operation and maintenance of the port infrastructure. Section 80-IA(4), inter alia, qualifies an enterprise engaged in the business of operating and maintaining an infrastructure facility for deduction under the said section and this is exactly the nature of the assessee's business and, hence, the assessee is eligible for deduction in terms of proviso to Section 80-IA(4)(i). It concluded that the proviso to Section 80-1A(4) does not require that there should be a direct agreement between the transferee enterprise and the specified authority; assessee company engaged in operation and maintenance of port infrastructure which was transferred by the developer to the assessee in accordance with the agreement with the specified authorities was eligible for deduction under Section 80-IA." 52. The Hyderabad Bench of Tribunal has very categorically relied on the agreement between the transferee enterprise and the specified authority as the assessee company was engaged in operation and maintenance of port infrastructure which was transferred by the developer to the assessee in accordance with the agreement and in view of these circumstances, it was held that the specified authority was eligible for deduction under Section 80-IA of the Act. In the present case also, the developer is claiming deduction in view of the development agreement entered with the landowners as well as the prospective buyers.

53. The Tribunal, Pune Bench, in the case of *Nirmiti Construction v.Dy. CIT* (supra) held that "The deduction under Section 80-IB(10) was admissible to those undertakings which commenced the development and construction of housing project on or after 1st Oct., 1998. In the instant case, it is the contention of the assessee that the development and construction of housing project was commenced after 1st Oct., 1998.

However, the Department took the stand that in this case the development commenced with the development agreement and acquiring irrevocable power of

attorney and moreso, when layouts were furnished to the municipal corporation for preliminary sanction on 6th June, 1998. It is clear that the assessee had not made any material change as far as the land is concerned. Admittedly, construction work was commenced after building permission (Bandhkam Parwangi) was sanctioned by the municipal corporation on 23rd July, 1999. The only debits prior to 1st Oct., 1998, were in respect of land purchased and two items, viz., Rs. 6,000 and Pooja expenses of Rs. 1,140. Admittedly, the bank account in the name of housing project was opened on 20th Oct., 1998.

The assessee also incurred land measurement charges of Rs, 10,350 on 25th Nov., 1998. Admittedly, non-agricultural tax was paid on 15th Jan., 1999, of Rs. 1,25,150. The assessee also informed the AO regarding commencement of the housing project on 23rd Nov., 1999. It is also admitted position that the land was converted into non-agriculture on 30th Jan., 1999. This fact alone shows that the assessee had commenced the development and construction after 1st Oct., 1998.

Without obtaining the permission of the Collector, the assessee could not have commenced development and construction of the housing project.

It is also admitted fact that the assessee presented the building plan to the municipal corporation and the said corporation sanctioned the building plan on 23rd July, 1999. It means that the municipal corporation granted the permission of construction on 23rd July, 1999.

The activities, viz., approval of the plan, marketing for booking the residential units, availing of finance, receipt of advance booking money, etc. could not be construed to mean commencement of development and construction of housing project. As per the certificate of architect, the project of constructing housing units commenced after 1st Oct., 1998. The assessee had also opened bank account in the name of housing project on 29th Oct., 1998. All these facts indicate that development and construction commenced after 1st Oct., 1998. It is also seen that the assessee had incurred a sum of Rs. 6,000 towards the cleaning of land and also incurred an expense of Rs. 1,140 towards Pooja expense. These expenses do not indicate that development and construction of housing project had been commenced before 1st Oct., 1998. Rs. 6,000 was incurred for cleaning the land,

so that correct measurement of the land could be done. There is no material on record to show that the assessee had made any material change on the land before 1st day of Oct., 1998. From the above discussion, it would be clear that the assessee had commenced the development and construction of the housing project after 1st day of October, 1998, and completed the same before the specified date. There is no dispute that the assessee had fulfilled the remaining conditions under the law for claiming deduction under Section 80-IB(10). Accordingly, the AO is directed to allow the deduction to the assessee." It can be seen that in this case nothing was done by the assessee to hold it as a developer. The facts are entirely different and the issue before the Bench was also entirely different which does not relate to the present issue in hand.

54. The Supreme Court in the case of CIT v. South Arcot District Cooperative Marketing Society Ltd. (supra) dealt with the concept of liberal construction for granting deduction under Section 80P of the Act. It held that a liberal interpretation should be given to the language of the provision while dealing with the exemption provisions.

It is stated that having regard to the object with which the provision has been enacted, it is apparent that a liberal construction should be given to the language of the provision. As in the present case, there is no condition as regards to ownership in the provisions of Section 80-IB(10) of the Act, we feel that taking a liberal construction of the provision, the assessee is eligible for deduction under Section 80-IB(10) of the Act. CIT v. U.P. Co-operative Federation Ltd. (1989) 76 CTR (SC) 22 : (1989) 176 ITR 435 (SC) also adopted a liberal approach in granting a deduction.

55. The Supreme Court in the case of CIT v. J.H. Gotla (supra) has also very categorically stated that the beneficial interpretation in favour of assessee should be adopted. In the present case, there is no condition as regards to ownership and if we interpret strictly the provision, then the assessee is eligible for deduction under Section 80-IB(10) of the Act. Bishan Das and Ors. v. State of Punjab and Ors.

(supra) the Supreme Court has observed that "It is by now well-settled that the maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law of this country; see *Thakoor Chunder Parmanick v. Ramdhone Bhattacharjee*; 2. *Beni Ram v. Kundan Lall*; 3. and *Narayan Das Khettry v. Jatindranath*. These decisions show that a person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land by the application of the maxim "*quicquid plantatur solo, solo eedit*." Nothing turns on this case. In the present case the assessee develops the project as per agreements whereunder it had acquired certain rights as owner. *Pandian Chemicals Ltd. v. CIT* (supra) observed that whenever the legislature wanted to give a restricted meaning in the manner suggested by the learned Solicitor General, it has used the expression 'derived from', as, for instance, in Section 80J. In our view, since the expression of wider import, namely, 'attributable to', has been used, the legislature intended to cover receipts from sources other than the actual conduct of the business of generation and distribution of electricity. *B.M. Parmar v. CIT* (supra) held that "In the matter of tax, the statute is to be interpreted strictly. A provision has to be construed keeping in view the purpose and object for which it is enacted. The concept of commercial principles on business practice would not be relevant unless it is found to be inevitable.

59. The Supreme Court in the case of *CIT v. Strawboard Manufacturing Co. Ltd.* (supra) and the Punjab & Haryana High Court in the case of *CIT v. Strawboard Manufacturing Co. Ltd.* 1975 CTR (P&H) 17 : (1975) 98 ITR 78 (P&H) holding "an interpretation clause which extends the meaning of a word does not take away its ordinary meaning. An interpretation clause is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act, when there is nothing in the context or the subject-matter to the contrary, to be applied to something to which it would not ordinarily be applicable." It further observed that even if both the interpretations--one put by the learned Counsel for the company and the other by the learned Counsel for the Department--are taken to be correct, it is the principle of interpretation that the interpretation which is favourable to the subject should be adopted and that which is favourable to the Department should be discarded. In

case that principle is applied to the present case, the interpretation which supports the assessee has to be accepted. We need not go that far as in our opinion on a plain reading of the agreements and the provisions of law, the assessee is entitled to the deduction clearly. CIT v. N.P. Mathew and Ors.

(supra) also observed that if another view is possible, the well known principle in taxation is that if two views are possible, the view in favour of the assessee has to be accepted as held by the apex Court in CIT v. Kulu Valley Transport Co. (P) Ltd. . A taxing statute has to be interpreted strictly.

61. The Calcutta High Court in the case of Hilltop Holdings India Ltd. v. CIT and Ors. (supra) held that it cannot be said that for an inaction of the IT authorities the provisions of Section 263 are to be stretched and applied so far as it comes in conflict with Section 264 rendering the purpose of introduction of the Explanation altogether nugatory. The Court cannot supplant the legislation. If the legislature intends to treat a particular provision in a particular manner, the Court is not supposed to lend its wisdom to the legislation. On a plain reading of the provisions of Section 80-IB(10), we have (sic-not) taken a view reading something which is not there or omitting something which is there and material for deciding the issue before us.

62. In the cases of M/s Deep Developers (ITA No. 2444/Ahd/2006), M/s Dhara Developers (ITA No. 2445/Ahd/2006), M/s Pramukh Associates (ITA No. 2824/Ahd/2006), M/s Aashiyana Developers (ITA No. 2816/Ahd/2006), M/s Bhakti Construction (ITA No. 2818/Ahd/2006), M/s Super Construction (ITA No. 2820/Ahd/2006), M/s Subham Associates (ITA No. 2821/Ahd/2006), M/s Avani Traders (ITA No. 2822/Ahd/2006), M/s Kismat Construction (ITA No. 2823/Ahd/2006), M/s Rutu Developers (ITA No. 2856/Ahd/2006) and M/s Sahjanand Developers (ITA No. 672/Ahd/2007), a question has also been raised by the Revenue that the profit earned by the assessee are not for developing and building housing project alone but for the sale of extra FSI, which has not been utilized for developing and building housing project. On a perusal of the provisions of Section 80-IB(10), we find that it is not mandatory requirement to fully utilize permissible FSI; there is no condition as to FSI under the scheme of the provisions

of Section 80-IB(10) of the Act; there is no question of selling unused FSI to the individual buyer for each project and also there is no question of calculating the profitability on FSI as the same has not been contemplated under Section 80-IB(10) of the Act. On verification of the sale deeds executed in favour of buyers of the residential houses, it is clear that the assessee had made this sale deed for sale of plot of land. Further, on verification of development agreement with the landowner, we find that here also the reference is with respect to land area only. In both the documents assessee had not acquired rights and has not relinquished rights with reference to FSI. Further, on verification of approved map for each unit is with reference to built-up area only. Under the circumstances, the assessee has never dealt with FSI, both in terms of acquiring rights in the land and for relinquishment of such rights in the land. The calculation given in approved plan is of maximum permissible FSI and by giving such calculation it is not made mandatory by any provisions of any Act to make construction to the fullest extent of maximum permissible FSI. The utilization of FSI by the builder developer depends on many factors like situation of plot, the type of locality and the type of buyers' affordability. It is the market force, which determines the average size of the residential unit - a commercial decision, which prevails for the purpose of carrying out the business and for making residential units and not the permissible maximum FSI. It would also be impossible to construct any housing unit as per the provisions of Section 80TB(10) by utilizing the maximum FSI.⁶³ The AO states further that in the approved layout plan, the local authority had permitted to build residential unit of lesser area than the maximum permissible built-up area on the land and therefore the assessee had carried out only partial construction of the available FSI vis-a-vis the entire plot of land available for development with the assessee. We find that the approved FSI in regard to the units constructed has been fully utilized as per the approved plan of the local authority, namely, the FSI is fully utilized, the FSI actually passed and permitted by the authorities for each project.

64. The AO observes that assessee has sold unutilized FSI without involving any process of development and construction, which is the primary criterion required to be satisfied for the purpose of the claim of deduction under Section 80-IB of the Act no force; that the assessee has claimed deduction under Section 80-IB of

the Act for profit derived during the year under consideration from the business of development and construction of a housing project which though includes profit earned from sales of unutilized FSI of the housing project also and that the other part of unutilized FSI relating to the approved units have not been constructed or developed but being sold directly, although as an unrestrictive bundle of rights attached with the sale of land plot. As aforesaid, there is no requirement as to the FSI under the scheme of provisions of Section 80-IB(10). In any case the assessee has not sold FSI of plot, even if the unutilized FSI rights are available with the assessee, it is the only way left out of utilizing such unutilized FSI is to make construction on top of the ground floor, which is already being sold to prospective buyers. With this so-called unutilized FSI rights, if the assessee wishes to make further construction then it will be practically impossible as the assessee is left with no easement rights for making construction or access to go on top of the ground floor as the ground level rights are already sold to prospective customer. In this situation it would be practically impossible to make either construction or to give access for construction made. Thus, the concept of element of unutilized FSI sold is imaginary and based on surmises and conjunctures.

65. In case of M/s Ashirwad Enterprises (ITA No. 2527/Ahd/2006), the assessee's second dispute is against the non-adjudication of a ground in respect of disallowance of Rs. 48,042 made by the AO under Section 40A(3) of the Act. On verification of the records, it seems that the CIT(A) has not adjudicated this ground. We, accordingly, remit the matter back to the file of the CIT(A) for deciding the matter in accordance with law, after affording adequate opportunity of being heard to the assessee.

66. In case of M/s Darshan Developers (ITA No. 2528/Ahd/2006), the assessee's contention was that the CIT(A) has not adjudicated the ground in respect of telephone expenses, office expenses and site expenses totalling to Rs. 31,190. In this case also, we remit the matter back to the file of the CIT(A) for deciding the matter in accordance with law, after affording adequate opportunity of being heard to the assessee.

67. In In case of M/s Shyamal Builders (ITA No. 2876/Ahd/2006), the assessee's another dispute was against the addition of Rs. 2,46,486 on account of interest chargeable on loans advanced to the sister-concern and others on the ground that the assessee has transferred the interest-bearing funds to them. The AO noticed that interest-bearing loans had been diverted to the sister-concern on which no interest was charged. The assessee's contention was that the advances had been given out of interest-free funds available with the assessee and the partners have capital balances totalling to Rs. 3,15,50,344 out of which interest-free loans were advanced to the sister concern. However, the AO, rejected the claim of the assessee that no interest be charged on the loans advanced to its sister-concern, because of the fact that the assessee is paying interest-free loans to its sister-concern out of the capital of the partners whereas the assessee is paying interest @ 2 per cent per annum on partners capital. He, accordingly, worked out the interest rate @ 2 per cent which comes to Rs. 2,46,486 and the same is added to the total income of the assessee.

68. We have heard the parties and considered the rival submissions. As per the admission of the assessee that the amount has been given to the sister-concern out of the capital of the partner and on which interest has been paid by the assessee @ 2 per cent. In these circumstances, the disallowance at 2 per cent by the AO cannot be said to be unjustified.

It was, accordingly, rightly upheld by the CIT(A). His order is, thus, confirmed.

In case of M/s Sahjanand Developers (ITA No. 672/Ahd/2007), the assessee's other disputes were against the addition of Rs. 4,780 for purchase of fan and Rs. 3,908 for telephone expenses as they are of earlier years. As regards the purchase of fan the AO disallowed the claim of the assessee stating that the assessee had claimed deduction under Section 32 and thus no further deduction is allowable. As regards telephone expenses the AO stated that the assessee is following mercantile system of accounting and the expenses pertain to earlier is not allowable. Since the assessee could not bring any material or evidence to defend its claim, the CIT(A) upheld both the additions.

Before us also, the assessee could not substantiate its claim by bringing any material on record but simply stated that its claim may be allowed. We, accordingly, uphold the orders of the Revenue authorities and dismiss this ground of the assessee.

69. Charging of interest under Sections 234A, 234B, 234C and 234D being consequential and therefore does not require any specific adjudication.

Initiation of penalty under Section 271(1)(c) being a separate proceeding therefore, no discussion is called for at this stage.

In the result, assessee's appeals are partly allowed and Revenue's appeals are dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com