IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO.507 of 2014

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

Versus

VISHAL DEVELOPERS....Opponent(s)

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Appearance:
MR NITIN K MEHTA, ADVOCATE for the Appellant(s) No.1
MR RK PATEL, ADVOCATE for the Opponent(s) No.1

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CORAM: **HONOURABLE MS. JUSTICE HARSHA DEVANI**
and
HONOURABLE MS. JUSTICE SONIA GOKANI

Date : 07/10/2014

ORAL ORDER
(PER : HONOURABLE MS. JUSTICE HARSHA DEVANI)

1. The appellant – revenue has challenged the order dated 6th September, 2013 made by the Income Tax Appellate Tribunal, 'B' Bench, Ahmedabad (hereinafter referred to as "the Tribunal") in ITA No.2570/Ahd/2010 by proposing the following three questions stated to be substantial questions of law:

[A] "Whether the Tribunal is right in law and on facts in allowing deduction u/s. 80IB(10) of the Act amounting to Rs.4,62,69,270/-?"

[B] *"Whether Tribunal is right in law and on facts to follow the decision in the case of M/s. Radhe developers and ignore the material facts of the present case interalia that the Co-operative Housing Society is the owner of the land which has neither contracted with the Assessee to sell the land to it or through it to the members and continue to hold land in its name even after the members*

being sold the super structure?"

[C] "Whether after the latest Supreme Court decision in case of Larsen & Toubro vs. State of Karnataka [(2014) 1 SCC 708], can the case of Radhe developers [329 ITR 01 (Guj)] be applied on the facts of the present case and the contract with the Assessee not be termed as works contract?"

The assessment year is 2007-08 and the relevant accounting period is the financial year 2006-07.

2. The facts stated briefly are that land bearing various survey numbers and block numbers totally admeasuring 50,800 square metres came to be purchased by Satellite Ambli Co-operative Housing Society Limited (hereinafter referred to as "the Society") on 13th December, 2004 for a consideration of Rs.47,32,000/-. Pursuant to the application and plan filed by the society, the local authority accorded permission for development and construction of the project to the Society and Sapna Ambli Co-operative Housing Society Limited on 27th April, 2005 and 4th January, 2006. The assessee entered into a Development Agreement with the above referred Societies on 17th February, 2006 and in terms of the agreement, the assessee was given possession of the land for construction of housing units as per the plan. The assessee was allowed to enroll prospective buyers as members on behalf of the Society and was also allowed to collect the consideration for land as well as super-structure from the buyers on behalf of the Society and to retain the consideration received and charge the land cost to the Society. The Assessing Officer observed that during the year under consideration, the assessee had constructed a housing project

and had shown net profit of Rs.4,62,13,330/-. The assessee had claimed deduction of Rs.4,62,69,270/- at 100% of its profits under section 80IB(10) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) stating that it was entitled to deduction under the said provision in respect of its entire income. The Assessing Officer held that the Society was formed for group housing of the members and was supposed to construct and transfer the housing societies to its members. In terms of the development agreement, since the Society had no experience of construction, the assessee was allowed to construct the housing units on behalf of the Society according to the approved plan of the Society. The Assessing Officer further found that the assessee was not the owner of the land but that the land was in the name of the Society for construction of housing units. The Assessing Officer, accordingly, concluded that the assessee was not both, a developer and builder, as required by the provisions of section 80IB(10) of the Act. The Assessing Officer was of the view that the assessee was not a developer because it did not conceptualize and own the project, inasmuch as, the assessee was not the owner of the land and the approval was not issued to it by the local authority. The assessee had entered into the project by a Development Agreement with the land owner and construction was done as per the agreement and hence, the assessee was merely a contractor for the purpose of construction of the project. The assessee had not sold any unit to the purchaser but the Society had executed the sale deeds as a seller and the assessee joined only as a confirming party to the transaction, which proved that the assessee was merely a contractor/agent of the Society. The Assessing Officer further found that as per the amendment to section 80IB of the Act by

the Finance Act, 2009, a works contractor who executes the work awarded by any person is not eligible for deduction under section 80IB of the Act and that the expression “any person” would include the above referred two societies which are separate legal entities. The Assessing Officer, accordingly, held that the assessee did not fulfil the conditions laid down under section 80IB(10) of the Act. The assessee carried the matter in appeal before the Commissioner of Income-tax (Appeals) who allowed the claim of the assessee after considering the terms and conditions of the agreement between the societies and the assessee. Revenue went in appeal before the Tribunal but did not succeed.

3. Mr. Nitin Mehta, learned senior standing counsel for the appellant strenuously argued that the Tribunal has failed to consider the explanation to section 80IB(10) of the Act. According to the learned counsel, the work in question was a works contract and hence, the provisions of sub-section (10) of section 80IB of the Act would not be attracted in the facts of the present case. Strong reliance was placed upon the decision of the Supreme Court in the case of ***Larsen and Toubro Limited v. State of Karnataka, (****2014) 1 SCC 708* wherein it has been held thus: “*In the development agreement between the owner of the land and the developer, direct monetary consideration may not be involved but such agreement cannot be seen in isolation to the terms contained therein and following development agreement, the agreement in the nature of the tripartite agreement between the owner of the land, the developer and the flat purchaser whereunder the developer has undertaken to construct for the flat purchaser for monetary consideration. Seen thus, there is nothing wrong*

if the transaction is treated as a composite contract comprising of both a works contract and a transfer of immoveable property and levy of sales tax on the value of the material involved in the execution of the works contract." It was submitted that the said decision construes the expression "works contract" in general terms and not in terms of the relevant Sales Tax Act and as such, would apply to the facts of the present case. It was submitted that the facts of the present case are different from the facts in the case of ***Commissioner of Income-tax v. Radhe Developers,*** *(2012) 341 ITR 483 (Guj.).* It was contended that the above decision of this court was rendered in relation to cases prior to the insertion of the Explanation to section 80IB(10) of the Act and hence, the same would not be applicable to the fact of the present case.

3.1 It was further submitted that the Tribunal has failed to appreciate that land was allotted to the members and after allotment, the assessee firm entered into a contract for development, individually with each member, and that the assessee firm had executed a contract with each member for the plot allotted to them by the Society. It was argued that the Tribunal has erred in not appreciating the fact that the test of dominant control over the land would not be applicable inasmuch as the work carried out by the respondent-assessee remains to be in the nature of works contract and as such, the assessee is not entitled to deduction under section 80IB(10) of the Act. It was pointed out that in this case, the land was never sold by the Society and it was also not permitted by its bye-laws to do so and that unlike in the case of Radhe Developers, the risk was never assumed or transferred by the assessee in this case. It was, accordingly, urged that the matter requires

consideration and that the appeal deserves to be admitted on the questions of law as proposed or as may be deemed fit by this court.

4. Vehemently opposing the appeal, Mr. R.K. Patel, learned counsel for the respondent-assessee submitted that the decision of this court in the case of ***Commissioner of Income-tax v. Radhe Developers*** (supra) would be squarely applicable to the facts of the present case. On the merits of the case, it was submitted that the core conditions as laid down under section 80IB(10) of the Act are duly satisfied in the facts of the present case. It was pointed out that the assessee firm had paid the land cost to the society and had also entered into a Development Agreement with the society and had acquired the dominant control over the land from the date of acquisition of the land and had built and developed the residential housing project in the name and style of Vraj Homes by incurring all the expenses of construction, development and administration, taking all risks involved therein. It was submitted that the Development Agreement also makes it clear that it is the assessee-developer who is responsible for the profit or loss in respect of the development of the housing project and has the dominant control over the land from the date of acquisition of the land and all the risks as to cost of construction and development of the housing project and profit or loss of the housing project vests with the developer. Referring to the findings recorded by the Commissioner (Appeals) as well as the Tribunal, it was submitted that both, the Commissioner (Appeals) as well as the Tribunal, have recorded concurrent findings of fact to the effect that the present case stands squarely covered by the

decision of this court in the case of *Radhe Developers* (supra). It was submitted that thus, the decision of the Tribunal is based upon concurrent findings of fact recorded by it upon appreciation of the evidence on record and in the absence of any perversity in the findings recorded by the Tribunal, there is no warrant for interference by this court. Insofar as reliance placed by the learned counsel for the appellant upon the decision of the Supreme Court in the case of ***Larsen and Toubro Ltd. v. State of Karnataka*** (supra) is concerned, it was submitted that the said decision was rendered in the context of the Karnataka Sales Tax Act, 1957 and would not be applicable to the facts of the present case. It was, accordingly, urged that the appeal being devoid of merit, deserves to be dismissed.

5. This court has considered the submissions advanced by the learned advocates for the respective parties and has perused the decisions cited at the bar as well as the impugned order passed by the Tribunal and the orders passed by the lower authorities.

6. As can be seen from the order passed by the Commissioner (Appeals), he, upon appreciation of the evidence on record, has found that the assessee had practically purchased the land and had borne the entire cost and risk of developing the project. After referring to the various clauses of the Development Agreement, the Commissioner (Appeals) was of the view that the assessee fulfils the conditions laid down for claiming deduction under section 80IB(10) of the Act and had invested in cost of land (“has practically purchased land”) and acquired dominant control over the land (as obvious from

the clauses of the Development Agreement) for the development of the project and meets with all the tests laid down by the Tribunal in the decision delivered in the case of M/s. Shakti Corporation.

7. The Tribunal in the impugned order has concurred with the findings of fact recorded by the Commissioner (Appeals) and has found that as per the Development Agreement and facts of the case, the assessee had taken full responsibility for execution of the development project. The assessee had been given full authority for execution of the said development project, including development of the land and construction of residential units. The assessee had engaged professionals such as architect for designing architectural work and had also enrolled members and collected the consideration from the buyers of the residential units. The assessee had also paid the cost of the land to the Societies including stamp duty and had taken possession of the land for construction of the project. The Tribunal observed that as per the decision of this court in the case of ***Radhe Developers*** (supra), a legal title was not required for getting benefits under section 80IB(10) of the Act and that the assessee was the deemed owner of the land under section 2(47) of the Act. Having regard to the fact that the assessee had borne the entire cost of construction, including materials, and the receipt was not fixed for the contractor and the assessee was a developer and builder of the housing project, the Tribunal upheld the order passed by the Commissioner (Appeals) and dismissed the appeal.

8. Thus, the Tribunal upon appreciation of the

evidence on record has found that the present case meets with the parameters laid down by this court in the case of ***Radhe Developers*** (supra). It is not the case of the appellant that the assessee does not fall within the ambit of the principles laid down by this court in that case. On behalf of the appellant, it has been contended that the facts of this case are different from the facts in the case of *Radhe Developers*, inasmuch as, the land is allotted to members and after allotment the assessee firm has entered into a contract for development individually with each member. The contention raised by the learned counsel for the appellant is that the decision of this court in the case of ***Radhe Developers*** (supra) will not be applicable to the facts of the present case in view of the subsequent latest decision of the Supreme Court in the case of ***Larsen and Toubro Ltd. v. State of Karnataka*** (supra) which holds that a developer similarly situated like the present assessee is a works contractor for the property sold to the members before completion of the construction. Thus, it does not appear to be the case of the appellant that the facts of the present case are not covered by the decision of this court in the case of ***Radhe Developers***. The main plank of the submissions of the learned counsel for the appellant is that in view of the decision of the Supreme Court in the case of ***Larsen and Toubro v. State of Karnataka*** (supra), the test of dominant control over the land is no longer applicable, inasmuch as, the work carried out by the respondent-assessee remains to be in the nature of a 'works contract' and, therefore, the assessee is not entitled to deduction under section 80IB(10) of the Act. According to the learned counsel for the appellant, in the light of the above decision of the Supreme Court which construes the expression "works

contract" in general terms and not in terms of the relevant Sales Tax Act, the same would be applicable to the facts of the present case and the assessee being engaged in executing a works contract, would in view of the explanation to sub-section (10) of section 80IB of the Act, which says that nothing contained in the sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person including the Central or the State Government, the present case does not fall within the ambit of sub-section (10) of section 80IB of the Act and as such, the assessee is not entitled to the benefit thereof. It has also been submitted on behalf of the appellant, that the present case relates to assessment year 2007-08 whereas the Explanation to sub-section (10) of section 80IB of the Act came to be inserted with effect from 1st April, 2001 and hence, the present case would be governed by the Explanation and the work in question being in the nature of a "works contract", the provisions of section 80IB(10) of the Act would not be attracted. It is the case of the appellant that the Commissioner (Appeals) as well as the Tribunal, have failed to consider the above referred aspect.

9. Before adverting to the merits of the case, it may be germane to refer to the decisions on which reliance had been placed by the learned counsel for the respective parties. Since the Tribunal has upheld the order passed by the Commissioner (Appeals) on the basis of the decision of this court in the case of ***Commissioner of Income-tax v. Radhe Developers*** (supra), reference may be made to the findings recorded by the court in that decision, which are as follows:-

"31. Neither the provisions of Section 80-IB nor any other provisions contained in other related statutes were brought to our notice to demonstrate that ownership of the land would be a condition precedent for developing the housing project. It was perhaps not even the case of the Revenue that under the other laws governing construction in urban and semi-urban areas, there was any such restriction. It is, however, the thrust of the argument of the Revenue that in order to receive benefit under Section 80-IB(10) of the Act, such requirement must be read into the statute. We cannot accept such a contention. Firstly, as already noted, there is nothing under Section 80-IB(10) of the Act requiring that ownership of the land must vest in the developer to be able to qualify for such deduction. Secondly, term "developer" has been understood in common parlance as well as in legal sense carrying a much wider connotation. The Tribunal itself in the impugned order has traced different meanings of the term "developer" explained in different dictionaries, which read as under :

"a. The Webster's Encyclopedia unabridged of the English language gives the following meaning of the term developer as :

1. One who or that which develops ;

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 persons or company that develops land.

c. Random House Dictionary of the English Language, the following can be found.

Develop

a. To bring out the capabilities or possibilities of; bring to a more advanced or effective state.

b. To cause to grow or expand.

Developer

a. The act or process of developing; progress.

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

d. Webster Dictionary,the following definitions emerge:

a. To realize the potential of;

b. To aid in the growth of Strength, develop the biceps,

c. To bring into being: make active (develop a business)

d. To convert (a tract of land) for specific purpose, as by building extensively.

e. Law lexicon Dictionary: The following definitions could be seen:

Development

a. To act, process or result of development or growing or causing to grow; the state of being developed.

b. Happening."

32. Section 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 section 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. The assessee would enroll members and collect charges. Profit or loss which may result from execution of the project belonged entirely to the assessee. It can thus be seen that the assessee had developed the housing project. The fact that the assessee may not have owned the land would be of no consequence.

35. With respect to the question whether the assessee had acquired the ownership of the land for the purposes of the Income-tax Act and, in particular, section 80-IB (10) of the Act and to examine the effect of the Explanation to section 80-IB(10) introduced with retrospective effect from April 1, 2001, since several aspects overlap, it would be convenient to discuss the

same together.

36. We have noted at some length, the relevant terms and conditions of the development agreements between the assessees and the land owners in case of Radhe Developers. We also noted the terms of the agreement of sale entered into between the parties. Such conditions would immediately reveal that the owner of the land had received part of sale consideration. In lieu thereof he had granted development permission to the assessee. He had also parted with the possession of the land. The development of the land was to be done entirely by the assessee by constructing residential units thereon as per the plans approved by the local authority. It was specified that the assessee would bring in technical knowledge and skill required for execution of such project. The assessee had to pay the fees to the architects and engineers. Additionally, the assessee was also authorized to appoint any other architect or engineer, legal adviser and other professionals. He would appoint sub-contractor or labour contractor for execution of the work. The assessee was authorised to admit the persons willing to join the scheme. The assessee was authorised to receive the contributions and other deposits and also raise demands from the members for dues and execute such demands through legal procedure. In case, for some reason, the member already admitted is deleted, the assessee would have the full right to include new member in place of outgoing member. He had to make necessary financial arrangements for which purpose he could raise funds from the financial institutions, banks etc. The land owners agreed to give necessary signatures, agreements, and even power of attorney to facilitate the work of the developer. In short, the assessee had undertaken the entire task of development, construction and sale of the housing units to be located on the land belonging to the original land owners. It was also agreed between the parties that the assessee would be entitled to use the full FSI as per the existing rules and regulations. However, in future, rules be amended and additional FSI be available, the assessee would have the full right to use the same also. The sale proceeds of the units allotted by the assessee in favour of the members enrolled would be appropriated towards the land price. Eventually after paying off the land owner and the erstwhile proposed purchasers, the surplus amount would remain with the

assessee. Such terms and conditions under which the assessee undertook the development project and took over the possession of the land from the original owner, leaves little doubt in our mind that the assessee had total and complete control over the land in question. The assessee could put the land to use as agreed between the parties. The assessee had full authority and also responsibility to develop the housing project by not only putting up the construction but by carrying out various other activities including enrolling members, accepting members, carrying out modifications engaging professional agencies and so on. Most significantly, the risk element was entirely that of the assessee. The land owner agreed to accept only a fixed price for the land in question. The assessee agreed to pay off the land owner first before appropriating any part of the sale consideration of the housing units for his benefit. In short, the assessee took the full risk of executing the housing project and thereby making profit or loss as the case may be. The assessee invested its own funds in the cost of construction and engagement of several agencies. The land owner would receive a fix predetermined amount towards the price of land and was thus insulated against any risk.

37. By no stretch of imagination can it be said that the assessee acted only as a works contractor. The terms "works contractor" has been receiving judicial attention in several cases In the case of CIT v. Glenmark Pharmaceuticals Ltd. [2010] 324 ITR 199 (Bom.), the Bombay High Court observed as under (page 207):
"Contract of work or a contract of sale

The question as to whether a contract is a contract of work or a contract of sale is the subject-matter of precedents on the subject. The principles, as decided cases would show, are well defined but the application of those principles to individual cases often poses a difficulty. The consistent line of thinking that emerges from the decided cases is that essentially, in determining as to whether a contract constitutes one for work or is a contract of sale, it is the dominant interest and object of the parties in entering into the contract, as evinced by the terms of the contract, the circumstances of the contract and the custom of the trade that provide a guiding indicator. The object of the parties is of necessity to be deduced from the terms of the contract. In order to elucidate the distinction

which has been made, it would be necessary to turn to some of the authorities on the subject. While dealing with the authorities, it would be necessary to note that some of the decided cases deal with issues under the sales tax legislation and many of those judgments relate to the period prior to the enactment of the Forty-sixth Amendment to the Constitution. The technicalities of the sales tax legislation, especially as a consequence of the Forty-sixth amendment do not fall for determination in this proceeding. The decided cases are being referred to only with a view to emphasise the distinction between a contract for work and a contract for sale.

In Govt. of Andhra Pradesh v. Guntur Tobaccos Ltd., AIR 1965 SC 1396; 16 STC 240, the Supreme Court held that in the execution of a contract of work some materials may be used and property in the goods so used passes to the other party. However, the contractor who undertakes to do the work will not necessarily be deemed on that account to sell the materials. The Supreme Court noted that a contract for work in the execution of which goods are used may take one of three forms. Those three forms were elaborated as follows (page 1404 of AIR 1965 SC and page 255 of 16 STC):
'The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price: it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work: or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or gratuitous. In the last class there is no sale because though the property passes it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances: if it is of the first: it is a composite contract for work and sale of goods: where it is of the second category, it is a contract for execution of work not involving sale of goods.'

In a subsequent decision in the State of Punjab and Haryana v. Associated Hotels of India Ltd., AIR 1972 SC 1131; 29 STC 474, the Supreme Court held that a contract for sale is one whose main object is the transfer of property in, and the delivery of the possession of a chattel as a chattel to the buyer. Where the principal object of the work undertaken by the payee of the price is not the

transfer of a chattel, the contract is one of work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of material, nor the value of the skill and labour as compared with the value of the material, is conclusive, though these circumstances may be taken into consideration in deciding whether a subsisting contract is a contract of work and labour or contract for a sale of a chattel. In Sentinel Rolling Shutters and Engineering Co. Pvt. Ltd. v. CST, AIR 1978 SC 1747; 42 STC 409 this principle was reiterated by the Supreme Court. In State of Tamil Nadu v. Anandam Viswanathan, AIR 1989 SC 962; 73 STC 1, the contract in question involved supply and printing of question papers to universities. The assessee entered into those contracts for printing and the question involved was whether the taxable turnover for the purpose of the Tamil Nadu General Sales Tax Act, 1959 would include the printing and block making charges. The Supreme Court held that the contract in question was a contract of work, having regard to the nature of the job to be done and the confidence reposed in the contractor for work to be rendered. The supply of paper was merely incidental. More recently, in State of A.P. v. Kone Elevators (India) Ltd. [2005] 3 SCC 389; [2005] 140 STC 22, the assessee was under the terms of contract required to supply and install lifts to its customers, while it was the customers' obligation to undertake work connected in keeping the site ready for installation. The Supreme Court noted that under its contractual obligations, the assessee had undertaken the installation of lifts manufactured and brought to site in a knocked-down state and the contract in question was a contract of sale and not a works contract. The distinction between a contract of sale and a works contract found elaboration in the following observations (pages 26 and 27 of 140 STC):

"If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and

labour. Another test often to be applied is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale"; if it is the latter, it is a "works contract". Therefore, in judging whether the contract is for "sale' or for "work and labour", the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provide a guide in deciding whether transaction is a "sale" or a "works contract". Essentially, the question is of interpretation of the "contract". It is settled law that the substance and not the form of the contract is material in determining the nature of transaction."

In Hindustan Shipyard Ltd. v. State of Andhra Pradesh [2000] 119 STC 533, the Supreme Court enunciated certain principles which were deduced from the decided cases on the distinction between the two concepts. The second, third and fourth principles laid down in the judgment of the Supreme Court, read thus (page 545):

'(2) Transfer of property of goods for a price is the linchpin of the definition of "sale". Whether a particular contract is one of sale of goods or for work and labour depends upon the main object of the parties found out from an overview of the terms of the contract, the circumstances of the transaction and the custom of the trade. It is the substance of the contract document/s and not merely the form, which has to be looked into. The court may form an opinion that the contract is one whose main object is transfer of property in a chattel as a chattel to the buyer, though some work may be required to be done under the contract as ancillary or incidental to the sale, then it is a sale. If the primary object of the contract is the carrying out of work by bestowal of labour and services and materials are incidentally used in execution of such work then the contract is one for work and labour.

(3) If the thing to be delivered has only individual existence before the delivery as the sole property of the party who is to deliver it, then it is a sale. If A may transfer

property for a price in a thing in which B had no previous property then the contact is a contract for sale. On the other hand where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour.

(4) The bulk of material used in construction belongs to the manufacturer who sells the end-product for a price, then it is a strong pointer to a conclusion that the contract is in substance one for the sale of goods and not for work and labour. However, the test is not decisive...'

A contract for sale has hence to be distinguished from a contract of work. Whether a particular agreement falls within one or the other category depends upon the object and intent of the parties, as evidenced by the terms of the contract, the circumstances in which it was entered into and the custom of the trade. The substance of the matter and not the form is what is of importance. If a contract involves the sale of movable property as movable property, it would constitute a contract for sale. On the other hand, if the contract primarily involves carrying on of work involving labour and service and the use of materials is incidental to the execution of the work, the contract would constitute a contract of work and labour. One of the circumstances which is of relevance is whether the article which has to be delivered has an identifiable existence prior to its delivery to the purchaser upon the payment of a price. If the article has an identifiable existence prior to its delivery to the purchaser, and when the title to the property vests with the purchaser only upon delivery, that is important indicator to suggest that the contract is a contract for sale and not a contract for work. In India, the distinction between the two categories is elucidated by the Sale of Goods Act, 1930. Sub-section (1) of section 4 provides that a contract of the sale of goods is a contract, whereby a seller transfers or agrees to transfer the property in goods to the buyer for a price. Where under a contract of sale, the property in goods in transferred from the seller to the buyer, the contract is that of sale, but where transfer of property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is not a sale but is an agreement to sell. A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of the offer. Under section 5(1) the contract may provide for immediate

delivery of the goods or immediate payment of the price or postponement of delivery or payment of the price by instalments."

38. In the case of State of A.P. v. Kone Elevators (India) Ltd. [2005] 140 STC 22 (SC), apex court observed as under (page 26 of 140 STC):

"5. It can be treated as well settled that there is no standard formula by which one can distinguish a 'contract for sale' from a 'works-contract'. The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract'. In a 'contract of sale', the main object is the transfer of property and delivery of possession of the property, whereas the main object in a 'contract for work' is not the transfer of the property but it is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a 'sale', if it is the latter, it is a 'works-contract'. Therefore, in judging whether the contract is for a 'sale' or for 'work and labour', the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a 'sale' or a 'works-contract'. Essentially, the question is of interpretation of the 'contract'. It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a 'sale' or a 'works-contract'. Therefore, this question has to be ascertained on facts of each case, on proper

construction of terms and conditions of the contract between the parties."

39. In the present case, as already held the assessee had undertaken the development of a housing project at its own risk and cost. The land owner had accepted only the full price of the land and nothing further. The entire risk of investment and expenditure was that of the assessee. Resultantly, profit and loss also would accrue to the assessee alone. In that view of the matter, the addition of the Explanation to Section 80-IB(10) with retrospective effect from April 1, 2001, would have no material bearing in the cases on hand. We may recall that the said Explanation introduced by the Finance (No.2) Act, 2009, provided as under:-

"Explanation.- For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government)."

40. We may now move on to the question of ownership of the land.

41. The relevant portion of section 2(47) reads as under:-

"2(47) 'transfer', in relation to a capital asset, includes--...

(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

42. Section 53A of the Transfer of Property 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 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 of a transferee for consideration who has no notice of the contract or of the part performance thereof."

43. In the present case, we find that the assessee had, in part performance of the agreement to sell the land in question, was given possession thereof and had also carried out the construction work for development of the housing project. Combined reading of Section 2(47)(v) and Section 53A of the Transfer of Property Act would lead to a situation where the land would be for the purpose of Income-tax Act deemed to have been transferred to the assessee. In that view of the matter, for the purpose of income derived from such property, the assessee would be the owner of the land for the purpose of the said Act. It is true that the title in the land had not yet passed on to the assessee. It is equally true that such title would pass only upon execution of a duly registered sale deed. However, we are, for the limited purpose of these proceedings, not concerned with the question of passing of the title of the property, but are only examining whether for the purpose of benefit under section 80-IB(10) of the Act, the assessee could be considered as the owner of the land in question. As held by the apex court in the case of Mysore Minerals Ltd. v. CIT [1999] 239 ITR 775 (SC), and in the case of CIT v. Podar Cement Pvt. Ltd. [1997[226 ITR 625 (SC), the ownership has been understood differently in different context. For the limited purpose of deduction under section 80-IB(10) of the Act, the assessee had satisfied the condition of ownership also; even if it was necessary.

44. In the case of Shakti Corporation similarly the

assessee had entered into a development agreement with the land owners on similar terms and conditions. It is true that there were certain minor differences, however, in so far as all material aspects are concerned, we see no significant or material difference. Here also assessee was given full rights to develop the land by putting up the housing project at its own risk and cost. Entire profit flowing therefrom was to be received by the assessee. It is true that the agreement provided that the assessee would receive remuneration. However, such one word used in the agreement cannot be interpreted in isolation out of context. When we read the entire document, and also consider that in form of "remuneration" the assessee had to bear the loss or as the case may be take home the profits, it becomes abundantly clear that the project was being developed by him at his own risk and cost and not that of the land owners. Assessee thus was not working as a works contract. Introduction of the Explanation to section 80-IB(10) therefore in this group of cases also will have no effect.

45. We may at this stage examine the ratio of different judgments cited by the Revenue. The decision in case of Faqir Chand Gulati v. Uppal Agencies Private Limited [2008] 10 SCC 345 was rendered in the background of the provisions of the Consumer Protection Act. In the case before the apex court, the land owner had entered into an agreement with the builder requiring him to construct apartment building on the land in question. Part of the constructed area was to be retained by the owner of the land. In consideration of the land price remaining area was free for the builder to sell. When the land owner found series of defects in the construction, he approached the Consumer Protection Forum. It was in this background the apex court was considering whether the land owner can be stated to be a consumer and the builder a service provider. It was in this background that the apex court made certain observations. Such observations cannot be seen out of context nor can the same be applied in the present case where we are concerned with the deduction under section 80-IB(10) of the Act.

10. In ***K. Raheja Development Corporation v. State of Karnataka,*** *(2005) 141 STC 298*, the Supreme Court was

dealing with a case under the Karnataka Sales Tax Act, 1957. The court taking into consideration the definition of “works contract” as defined under section 2(1)(v-i) of the said Act, observed that the definition of the words “works contract” is very wide and it is not restricted to a “works contract” as commonly understood i.e. a contract to do some work on behalf of somebody else. The court held that the definition of works contract was a wide one which includes any agreement for carrying out building or construction activity for cash, deferred payment or other valuable consideration. The definition does not make a distinction based on who carries on the construction activity. Thus, even an owner of the property may also be said to be carrying on a works contract if he enters into an agreement to construct for cash, deferred payment or other valuable consideration. The court, accordingly, did not find the need to go into the question whether the appellants therein were owners as even if the appellants were owners, to the extent that they had entered into agreement to carry out construction activity on behalf of somebody else for cash, deferred payment or other valuable consideration, they would be carrying out works contract and would be liable to pay turnover tax on the transfer of property in the case involving such works contract.

11. In ***Larsen and Toubro v. State of Karnataka*** (supra), the Supreme Court once again was dealing with a case under the Karnataka Sales Tax Act as well as the Maharashtra Value Added Tax Act, 2002. The court was called upon to examine as to whether the ratio of the judgment of the Supreme Court in ***Raheja Development Corporation*** (supra) was correct. The court observed that a transfer of property in

goods under clause (29-A)(b) of Article 366 of the Constitution is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom the transfer is made. It was further observed that as a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and the other for supply of labour and service and as a result of such contract which was single and indivisible has been brought on a par with a contract containing two separate agreements. If the legal fiction introduced by Article 366(29-A)(b) is carried to its logical end, it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services. The court further observed that there is no doubt that to attract Article 366(29-A)(b), there has to be a works contract but then what is its meaning. The term “works contract” needs to be understood in a manner that Parliament had in its view at the time of the Forty-sixth Amendment and which is more appropriate to Article 366(29-A)(b). The court was of the opinion that the term “works contract” in Article 366(29-A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contract. Parliament had such wide meaning of “works contract” in its view at the time of the Forth-sixth Amendment. The object of insertion of clause (29-A) in Article 366 was to

enlarge the scope of the expression “tax on sale or purchase of goods” and overcome Gannon Dunkerley [AIR 1958 SC 560]. The court further held thus:

“72. … … … Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional obligations, such contract would be covered by the term “works contract”. Nothing in Article 366(29-A)(b) limits the term “works contract” to contract for labour and service only. The learned Advocate General for Maharashtra was right in his submission that the term “works contract” cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some “works”. We are also in agreement with the submission of Mr. K.N. Bhat that the term “works contract” in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Parliament had all genre of works contract in view when clause (29-A) was inserted in Article 366.

109. In Article 366(29-A)(b) the term “works contract” covers all genre of works contract and it is not limited to one specie of the contract. In Raheja Development[1] the definition of “works contract” in the KST Act was under consideration. That definition of “works contract” is inclusive and refers to building contracts and diverse construction activities for monetary consideration viz. for cash, deferred payment or other valuable consideration as works contract. Having regard to the factual position, inter alia, Raheja Development entered into development agreements with the owners of the land and it also entered into agreements for sale with the flat purchasers, the consideration being payment in instalments and also the clauses of the agreement, the Court held that developer had undertaken to build for the flat purchaser

and so long as thee was no termination of the contract, the construction is for and on behalf of the purchaser and it remains a "works contract". The legal position summarised by us and the foregoing discussion would justify the view taken by the two-Judge Bench in Raheja Development[1]."

12. On a combined reading of the above referred decisions, it is apparent that both the decisions of the Supreme Court in the case of *Larsen and Toubro Limited* (supra) as well as in *K. Raheja Development Corporation* (supra) were rendered in the backdrop of the Karnataka Sales Tax Act and the Maharashtra Value Added Tax Act. While construing the meaning of the term "works contract", what the Supreme Court had in mind was Article 366(29-A)(b) of the Constitution. By Article 366(29-A)(b), a legal fiction had been introduced into a contract which was divisible into one for sale of goods and the other for supply of labour. The Supreme Court while dealing with the above cases had understood the term "works contract" in the manner that Parliament had in its view at the time of the Forty-sixth Amendment which was more than appropriate to Article 366(29-A)(b) and which was not restricted to "works contract" as commonly understood i.e. a contract to do some work on behalf of somebody else. The ordinary meaning of the term "works contract" means a contract to do some work on behalf of somebody else whereas in the above decisions, the Supreme Court having regard to the provisions of Article 366(29-A)(b) has adopted a wider meaning of the expression "works contract". In the opinion of this court, while construing the provisions of the Income Tax Act, the ordinary meaning of the expression "works contract" is required to be taken into and resort cannot be had to the

meaning of the said expression as envisaged under the relevant Sales Tax Act which are in the context of the provisions of Article 366(29-A)(b) of the Constitution.

13. A Division Bench of this court in the case of ***Commissioner of Income Tax III v. Swastik Associates*** rendered on 7th May, 2014 in Tax Appeal No.348/2014 had referred to the decision of the Supreme Court in the case of *K. Raheja Development Corporation v. State of Karnataka* (supra) which held that the interpretation of the expression "works contract" was rendered in the background of the term "works contract" defined in Section 2(1)(v-i) of the Karnataka Sales Tax Act and it was in that backdrop that the Supreme Court concluded that the agreement was one of works contract. The court was of the view that the interpretation rendered by the apex court in the said decision was based not on the normal meaning of the term "works contract" but on the special meaning assigned to it under the Act itself, which provided for a definition of inclusive nature. The court was, accordingly, of the view that the Tribunal did not commit any error in holding that the assessees were entitled to the benefit under section 80IB of the Act even where the title of the lands had not passed on the assessees and under some cases the development permissions also have been obtained in the name of the original owners.

14. In ***Commissioner of Income Tax-I v. Archan Enterprises*** rendered on 18th March, 2014 in Tax Appeal No.171/2014, a Division Bench of this court had the occasion to consider the decision of the Supreme Court in the case of *Larsen and Toubro Ltd. v. State of Karnataka* (supra) and

Raheja Development Corporation (supra) in the context of the provisions of section 80IB(10) of the Act. The court held that the decision in the case of *Raheja Development Corporation* (supra) was rendered in the background of the definition of the term "works contract" contained in the Karnataka Sales Tax Act and even the decision in the case of *Larsen and Toubro Limited* (supra) was rendered in the context of Sales Tax/VAT of the said State. The Supreme Court while upholding the ratio of the decision in the case of *Raheja Development Corporation* (supra) further laid down certain principles for judging when a contract for construction can be stated to be a works contract and in the process when the materials used in the execution of such contracts can be exigible to Sales Tax/VAT. The Division Bench after considering both the above referred decisions of the Supreme Court did not find any reason to deviate from the case of ***Radhe Developers*** (supra)

15. The above referred decision in the case of ***Commissioner of Income Tax-I v. Archan Enterprises*** would be squarely applicable to the facts of the present case. Under the circumstances, when the Tribunal has recorded concurrent findings of fact to the effect that the decision of this court in the case of *Radhe Developers* (supra) would be squarely applicable to the facts of the present case, in the absence of any perversity being pointed out in the findings of fact recorded by the Tribunal, there is no warrant for interference. The decision of the Supreme Court in the case of *Larsen and Toubro Limited* (supra) having been rendered in the context of the Karnataka Sales Tax Act and the Maharashtra Value Added Tax Act, would not be applicable to the facts of the present case and the meaning assigned to the expression

"works contract" in the said decisions cannot be imported while construing the meaning of the said expression in the context of the provisions of the Income Tax Act.

16. In the light of the above discussion, it is not possible to state that there is any legal infirmity in the impugned order passed by the Tribunal, so as to give rise to any question of law, much less, a substantial question of law so as to warrant interference. The appeal, therefore, fails and is, accordingly, dismissed.

(HARSHA DEVANI, J.)

(MS. SONIA GOKANI, J.)

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