IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD C BENCH, AHMEDABAD

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

I.T.A. No.: 211(Ahd) of 2010
Assessment year: 2006-07

Shri Umeya Corporation ***..................Appellant***
7 Silver Plaza, Inside Nest Bungalow
Ramdevnagar, Ahmedabad 380051
[PAN: AAUFS1054Q]

Vs.

Income Tax Officer
Ward 9 (1), Ahmedabad ***................Respondent***

Appearances by:
Aarti N Shah, *for the appellant*
Sonia Kumar, *for the respondent*

Date of concluding the hearing: June 30, 2015
Date of pronouncing the order: July 7, 2015

O R D E R

Per Pramod Kumar AM:

1. By way of this appeal, the appellant has called into question the correctness of order dated 10th December 2009 passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2006-07.

2. In the first ground of appeal, the assessee has raised the following grievance:

> **The learned CIT(A) has erred in law and on facts of this case by holding that the Assessing Officer has rightly rejected the claim of depreciation of Rs 49,34,922 under section 80IB(10) of the Income Tax Act, 1961.**

3. So far as this grievance of the assessee is concerned, the relevant material facts are as follows. The assessee before us, a partnership firm, is engaged in the business of developing residential housing projects. During the course of the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has claimed a deduction of Rs 49,34,922 under section 80 IB (10) of the Act, but the assessee was not owner of the land on which housing project was developed. It was noted that "the assessee was not owner of the land on which the project was developed and the assessee had not acquired the dominant control over the project. The Assessing Officer was of the view that since the assessee did not own the land, since the necessary approval of the project was taken by the land owners and since the assessee has merely acted as an agent and as a contractor as it has entered into construction agreement with the landowners, the assessee is not eligible for deduction under section 80IB(10) of the Act. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. While rejecting the contentions of the assesse, learned CIT(A) observed as follows:

> ***After going through rival submissions following points emerge:***
>
> ***1. In this case the appellant entered into Development Agreements with the Owners of land to carry out work on behalf of the owners.***
>
> ***The appellant invested no amount with respect to purchase of land. In the Shakti Corporation case Hon'ble ITAT found that the land has been purchased as well as developed by the appellant, but this is not the case here. Vide written submission dated 24.11.2009 it was once again stated that the appellant had not purchased lands but the lands owned by the other persons have been developed in terms of Development Agreement. Development Agreement dated 2.7.2003 was entered by the appellant with the land owner Shri Ramabhai Chaturdas Patel for construction of the housing project known as Someshwar and another Agreement dated 2.4.2004 was entered with Shri Parsotambhai Joitaram Patel for construction / development of the housing project known as Someshwar Part 2. The perusal of the Development Agreements shows that the projects were built by the appellant, bearing all costs and the profit margin would be apportioned by the developer (this is clear from clause 13 or the Development Agreement), but at the very beginning of the Development agreement it has been mentioned that the Owner of the land is not the Developer, that the developer (appellant) had been appointed to develop / build by constructing tenements of the said properties along with the work of development of basic common infrastructure facilities. (please refer to clause 1 of the Development Agreement) . Clause 2 of the Development Agreement states as under:***
>
> > ***"The said Owner shall sell / allot to the desiring persons the plot/s either by himself or through the Developer/Builder being the party of the Second Part."***

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Thus in this case the land was never purchased by the appellant, neither any investment was made by the appellant towards cost of land. The appellant acted as an Agent / Contractor of the land owners and constructed the housing projects on the authority given by the land owners.

2 Reliance is placed on Hon'ble ITAT Mumbai Larger Bench, Mumbai decision in the case of M/s. B.T. Patil & Sons Belgaum Construction Private Limited dated 26.10.2009 (ITA No.1408 & 1409 / PN / 2003 AY 2000-2001 and 2001-02) where 80IA deduction has been denied holding the assessee to have entered into a Works Contract. In this decision in para 54 part of Memorandum explaining the provisions in the Finance bill 2007 has been quoted, relevant portion is reproduced below:

> ***".....Accordingly, it is proposed to clarify that the provisions of section 80-IA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. Thus in a case where a person makes the investment and himself executes the development work i.e. carries out the civil construction work, he will be eligible for tax benefit under section 80-IA. In contrast to this, a person who enters into a contract with another person (i.e. undertaking or enterprise referred to in section 80-IA) for executing works contract, will not be eligible for the tax benefit under section 80-IA."***

Thus the Memorandum points out investment also to make a developer eligible for deduction. Hon'ble ITAT Mumbai decision cited above is applicable in the case of the appellant because the appellant has not A made any investment towards ownership of land or project. It was assigned construction / development of the housing projects by the land owners, though it incurred cost and derived profit but it was never the Owner of the project or of the land on which it was constructed. The individual plots on which tenements were constructed were purchased by the individual tenement buyers from the land owners. The disallowance made by the AO u/s. 80IB(10) (on the grounds summarized in para 5 above) is therefore confirmed.”

4. The assessee is not satisfied and is in further appeal before us.

5. We have heard the rival contentions, perused the material on record and considered facts of the case in the light of the applicable legal position.

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

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> **32. Sec. 80-IB(10) of the Act thus provides for deductions to an undertaking engaged in the business of developing and constructing housing projects under certain circumstances noted above. It does not provide that the land must be owned by the assessee seeking such deductions.**
>
> **33. It is well settled that while interpreting the statute, particularly, the taxing statute, nothing can be read into the provisions which has not been provided by the legislature. The condition which is not made part of s. 80-IB(10) of the Act, namely that of owning the land, which the assessee develops, cannot be supplied by any purported legislative intent.**
>
> **34. We have reproduced relevant terms of development agreements in both the sets of cases. It can be seen from the terms and conditions that the assessee had taken full responsibilities for execution of the development projects. Under the agreements, the assessee had full authority to develop the land as per his discretion. The assessee could engage professional help for designing and architectural work. Assessee would enroll members and collect charges. Profit or loss which may result from execution of the project belonged entirely to the assessee. It can thus be seen that the assessee had developed the housing project. The fact that the assessee may not have owned the land would be of no consequence.**
>
> (Emphasis, by underlining, supplied by us)

7. In our humble understanding, therefore, in order to answer the question as to whether the condition precedent for deduction under section 80IB has been satisfied inasmuch as whether or not the assessee is engaged in "developing and building housing projects", all that is material is whether assessee is taking the entrepreneurship risk in execution of such project. When profits or losses, as a result of execution of project as such, belong predominantly to the assessee, the assessee is obviously taking the entrepreneurship risk *qua* the project and is, accordingly, eligible for deduction under section 80IB(10) in respect of the same. The assumption of such an entrepreneurship risk is not dependent on ownership of the land. The business model of "developing and building housing projects" by buying, on outright basis, and constructing residential units thereon could probably be the simplest business models in this line of activity, but merely because there is an improvisation in the business model or because the assesse has adopted some other business models for the purpose of developing and building housing project does not vitiate fundamental character of the business activity as long as the risks and rewards of developing the housing

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project, in substance, remain with the assesse. It is difficult, if not altogether impossible, to visualize all the business models that an assessee may use in this dynamic commercial world even as, in substance, the fundamental character of the business remains the same, but certainly such modalities or complexities of business models cannot come in the way of eligibility for an incentive which is for the purpose of 'developing and building a housing project'. There is no justification, conceptual or legal, in restricting eligibility of deduction under section 80IB(10) to any particular business model that an entrepreneur adopts in the course of developing and constructing housing project.

8. As regards learned CIT(A)'s reliance on the decision of a larger bench of this Tribunal, in the case of **B T Patil & Sons (Belgaum) Constructions Pvt Ltd vs ACIT [(2010) 1 ITR (Tribunal) 703 (Mum)],** what has been referred to by her is the view of the three member bench resolving the point of difference between the members of the division bench. However, this view was stillborn, and its relevance is confined to academic significance, for the reason that that while giving effect to the majority view, vide order dated 28th February, 2013 and on somewhat peculiar fact situation in this case, the final order of the Tribunal did not endorse these views. Quite to the contrary, following Hon'ble Bombay High Court decision in the case of **CIT Vs ABG Heavy Industries Ltd and Ors [(2010) 322 ITR 323 (Bom)]** and upon by taking into account Hon'ble Bombay High Court's specific directions in the case before the Tribunal, the Tribunal's final order had, *inter alia*, concluded as follows:

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

9. It is not even the case of the Assessing Officer that the assessee did not assume the entrepreneurship risks of the housing project. The format of arrangements for transfer of built up unit, and business model of the assessee for that purpose, is not decisive factor for determining eligibility of deduction under section 80 IB (10), but that is all that the authorities below have found fault with. The objections of the authorities below are thus devoid of legally sustainable merits. In view of the above discussions, and bearing in

mind entirety of the case, we are of the considered view that the stand of the authorities below, in declining deduction under section 80IB (10) and on the facts of this case, is incorrect. We vacate the same and direct the Assessing Officer to delete the disallowance.

10, Ground no. 1 is thus allowed.

11. In the second ground of appeal, the assessee has raised the following grievance:

> **The learned CIT(A) has erred in law and on facts of the case by confirming the disallowance made by the Assessing Officer amounting to Rs 32,89,325 under section 40(a)(ia) of the Income Tax Act, 1961.**

12. So far as this disallowance is concerned, it was made for the short reason that the assessee did not deposit the tax deducted at source from the related payments well within the time limit permitted under section 200(1) r.w.r. 30 of the Income Tax Rules. While the related payments were made to various contractors before 1st March 2006, the related payments were made only in the month of May 2006. Aggrieved by the disallowance so made, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

13. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

14. As the things stand now, it is not in dispute, in the light of a series of judgments of Hon'ble jurisdictional High Court, that the amendment brought to Section 40(a)(ia), which provides that as long as the taxes deducted at source have been deposited before the due date of filing return under section 139(1), disallowance under section 40(a)(ia) cannot be invoked for delay in depositing the tax deducted at source, is only clarificatory in nature and it will also apply to the assessment years prior to the assessment years 2010-11 as well. In the case of **CIT Vs Omprakash R Chaudhury & Others (TA No. 412 of 2013; judgment dated 22nd November 2013**), Hon'ble jurisdictional High Court has, *inter alia*, observed as follows:

> **"………we answer the substantial question of law raised in these appeals in favour of the assessee and against the revenue by holding that the amendment made in section 40(a)(ia) of the Income Tax Act, 1961, as retrospective in operation having effect**

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from 1st April 2005, i.e. from the date of insertion of Section 40(a)(ia) of the Act...."

15. There is no dispute that on the facts of this case, the taxes were deposited in May 2006, as is the categorical finding in paragraph no. 17 of the order passed the CIT(A), which was well before the due date of filing income tax return under section 139(1). In this view of the matter, and in the light of the law laid down by Hon'ble jurisdictional High Court, we uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned disallowance of Rs32,89,325. The assessee gets the relief accordingly.

16. Ground No. 2 is thus allowed as well.

17. In the result, the appeal is allowed. Pronounced in the open court today on 7th day of July, 2015.

Sd/xx	***Sd/xx***
S. S. Godara	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Ahmedabad, the 7th day of July, 2015

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

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad

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