

(2014) 03 GUJ CK 0056
In the Gujarat High Court

Case No : Tax Appeal Nos. 549, 1711, 1490, 581, 577, 574, 573, 572, 570, 568, 566, 565, 561, 558, 557, 556, 555, 554, 553, 552, 550 of 2008, Tax Appeal Nos. 489, 492, 323, 317, 304, 2228, 1681, 1424, 1312, 1311, 1273, 1272, 1265, 1229, 445, 495 of 2009 and Tax Appe

The Commissioner of Income Tax

APPELLANT

Vs

Moon Star Developers

RESPONDENT

Date of Decision : 11-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 143(2), 271(1)(c), 47, 47(vii), 80HH
Transfer of Property Act, 1882 — Section 2(47)(v), 53A

Citation : (2014) 269 CTR 259 : (2015) 1 GLH 384 : (2014) 367 ITR 621

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Bhatt, Mrs. Mauna Bhatt and Mr. K.M. Parikh, Advocate for the Appellant; S.N. Soparkar, Sr. Advocate and Mr. B.S. Soparkar, Advocate for the Respondent

Judgement

Akil Abdul Hamid, J.—In this group of appeals, two questions are raised by the Revenue for our consideration. The first issue is with respect to the claim of deduction by the respondents-assesseees u/s 80IB(10) of the Income Tax Act, 1961 ("the Act" for short). The assesseees are developers. They had developed housing projects fulfilling the conditions contained in section 80IB(10) of the Act and claimed deduction on the profits so earned from sale of such housing projects. The Revenue was of the opinion that the land on which the housing project was constructed was not owned by the assesseees and the development permission by the local authority was given in the name of the land-owners and not the assesseees. On such grounds, the Assessing Officer declined to grant the benefit of deduction u/s 80IB(10) of the Act, instead treating the assesseees as a works contractors. Such issues reached the Income Tax Appellate Tribunal ("the Tribunal" for short). The Tribunal ruled in favour of the assesseees. The Revenue thereupon filed further appeals before the High Court. In the case of The

Commissioner of Income Tax-I Vs. Radhe Developers, , this Court dismissed the Revenue's appeals and confirmed the view of the Tribunal. We would take note of the relevant portion of such judgment at a later stage.

2. The second issue also arises out of the assessee's claim for deduction u/s 80IB(10) of the Act. The Assessing Officer in addition to raising objection to the entire claim of the assessee for deduction u/s 80IB(10) of the Act further noticed that the assessee had not utilized the full extent of the Floor Space Index (FSI for short) of the land in question. After putting the assessee to notice and eliciting their response, the Assessing Officer, concluded that the profit which could be relatable to the sale of unutilized FSI cannot be stated to have been derived from the assessee's activity of development and construction of a housing project. Proportionate profit, therefore, reflected in the assessee's income from the sale of residential units was taken out from eligible deduction u/s 80IB(10) of the Act. The Tribunal on this issue also ruled in favour of the assessee. The Revenue, therefore, raised this additional question in these appeals. In Tax Appeals Nos. 549/08, 552/08, 553/08, 554/08, 556/08, 557/08, 558/08, 561/08, 565/08, 566/08, 568/08, 570/08, 572/08, 573/08, 574/08, 577/08, 581/08 though such issue arises, at the time of admission of the appeals, question relatable to this issue was not framed though it does arise out of respective judgment of the Tribunal. We therefore permit the Revenue to raise such additional question in such appeals. In other appeals, such an additional question has already been framed. For the purpose of all these appeals, therefore, we adopt the following common substantial question of law for our consideration:

Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that full deduction u/s 80IB(10) of the Act was available to the assessee even though the construction was carried out only utilizing a portion of FSI available?

3. We may first, deal with issue No. 1 which is possible of summary disposal since the issue is already covered by a decision of this Court in the case of Radhe Developers (supra). Under identical circumstances, this Court upheld the assessee's claim for deduction u/s 80IB(10) of the Act making following observations:

31. Neither the provisions of Section 80IB 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 u/s 80IB(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 u/s 80IB(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 term developer explained in different dictionaries, which read as under:-

a. The Webster's Encyclopedia unabridged of the English Language gives 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 80IB(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 80IB(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.

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 80IB(10) of the Act and to examine the effect of Explanation to Section 80IB(10) introduced with retrospective effect from 1.4.2001, 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 assesseees 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, 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 authorized 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, 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. 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.

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41. 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 u/s 80IB(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. vs. Commissioner of Income Tax (supra), and in the case of Commissioner of income tax vs. Podar Cement Pvt. Ltd. and others (supra), the ownership has been understood differently in different context. For the limited purpose of deduction u/s 80IB(10) of the Act, the assessee had satisfied the condition of ownership also; even if it was necessary.

42. 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 80IB(10) therefore in this group of cases also will have no effect.

43. We may at this stage examine the ratio of different judgments cited by the Revenue. The decision in case of Faqir Chand Gulati vs. Uppal Agencies Private Limited and another (supra) 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 u/s 80IB(10) of the Act.

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45. Under the circumstances, we are of the opinion that the Tribunal committed no error in holding that the assessees were entitled to the benefit u/s 80IB(10) of the Act even where the title of the lands had not passed on to the assessees and in some cases, the development permissions may also have been obtained in

the name of the original land owners.

4. Under the circumstances, in the present group of Tax Appeals also, such question is answered against the Revenue and in favour of the assesseees.

5. This brings us to the second question, pertaining to sale of unutilized FSI. Facts are slightly different in each appeal. We may, however, record the facts as arising in Tax Appeal No. 549 of 2008, which has been treated as lead matter.

6. For the assessment year 2003-04, the respondent assessee M/s. Moon Star Developers, Baroda, filed its return of income on 1.12.2003 declaring total income at nil. In such return, the assessee had declared gross total income of Rs. 26,99,082/- and claimed deduction u/s 80IB(10) of the Act on the entire income. The Assessing Officer desired to scrutinize the claim. He, therefore, issued notice u/s 143(2) of the Act. He noticed that the assessee had claimed such net profit of Rs. 26.99 lacs (rounded off) for development and building of a housing project. He noticed that the development permission granted by the local authority was in the name of one Shri Mustaqbhai Alibhai Patel and others who were the owners of the land. On the issue of deduction u/s 80IB(10) of the Act, on the "entire profit, he held as under:

7.12. The plain reading of section 80IB(10) makes it clear that profit in case of an undertaking developing and building housing project approved by a local authority shall be allowed deduction at 100% of profit derived from such housing project, if the conditions as laid down in sub-section 10 of section 80IB are fulfilled. However, in this case, as discussed above, the firm has not fulfilled the basic condition for claiming deduction, i.e. ownership of land on which housing project is constructed and the approval of local authority is not in the name of the assessee firm. Here I would like to make clear that the partner and partnership firm both are totally separate and different entity and have their own separate rights and obligations. The assessee does not become eligible for deduction u/s. 80IB of the Act on the plea that the land of the project was owned by the partner. The contention of the assessee that by entering into development contract it has acquired ownership right of the land has been squarely dealt with in the above discussion and therefore not acceptable. Hence, the deduction u/s. 80IB is not admissible. The assessee firm has furnished inaccurate particulars of income, therefore penalty proceedings u/s. 271(1)(c) of the I.T. Act is separately initiated.

Since this issue is already concluded by this Court in the case of Radhe Developers, we may, for the present discussion, ignore it.

7. The Assessing Officer, noticed that permission for construction was obtained for only part of the permissible FSI, the residential units to be constructed thus had area far less than the maximum permissible built-up area on the land. The assessee, thus, carried out only partial construction out of the total available FSI for the land in question. Though as per the approved plan, construction had been carried out, there was balance FSI available on the plots of land which was not

utilized. He was, therefore, of the opinion that the assessee could not claim deduction u/s 80IB(10) of the Act for the profit relatable to sale of unutilized FSI. He, therefore, called upon the assessee to explain the same.

8. The assessee made a detailed representation contending that it had completed the development and construction of housing project fulfilling all conditions contained in section 80IB(10) of the Act. The project was constructed on 12000 sq. meters of land. As per the building regulations of the local authority, maximum permissible construction was 1.6 times of the land area. As per the building bylaws for development of housing project, 10% of the total land area was to be set apart for common purposes. Primarily, 30 to 35% of the land area was utilised for providing internal roads, effectively, therefore, only 60% of the ground floor area was available for development. As per the building regulations, the constructed area on the ground floor could not exceed 40%. The assessee had completed the construction on the entire area permissible on the ground floor against the maximum construction limit of 3848.10 sq. meters, the assessee had carried out construction of 3573.48 sq. meters. The assessee further contended that the provisions of section 80IB pertain to granting of benefits to the assessee, the same should be interpreted liberally.

9. The Assessing Officer, rejected the assessee's claim making following observations:

11. The submission of assessee firm is duly considered but the same was not tenable. The argument that the assessee firm has developed the FSI available @ 40% of area for construction of ground floor houses, therefore the assessee has complied the condition prescribed. The local authority has imposed restriction of construction on ground floor @ 40% of area so that every residential unit have proper light, air and the parking space. Therefore, though anybody can develop property to the extent] of 1.6 times of area available subject to maximum ground floor construction @ 40% of "the area available. However, the assessee has not considered the FSI available on the ground floor i.e. the upper floor of the residential units. Due to non development of this available FSI, the question raised is still remains unanswered. The fact of the matter is that the assessee firm had undertaken to construct only a part of the FSI available to it under the scheme of things sanctioned by the local authority. The other part of unutilized FSI relating to the approved units have not been constructed or developed, but being sold directly, although as a composite part of unit of tenement itself. From this, it emerges that, the elements of profitability is relatable to the first part of construction of the approved units and the other part of the profit earned by the assessee firm is relatable to the sale of unutilized FSI in respect of which no construction was undertaken. The provisions of section 80IB(10) are clear and unambiguous in as much as it serves to benefit those assessee who had derived profits from the activity of development and construction of any housing project. Appreciating the facts involved in this case, assessee firm can be said to have involved in the partial construction of the housing project at one hand and the

other hand has enabled assessee firm to derive profit from sale of unutilized FSI, although it may be seen to be an integral part of the housing unit itself.

12. In the context of the above discussion, it is observed that the assessee firm had not undertaken the completion of the project in its entirety as far as development and construction of the utilizable FSI is concerned. The assessee firm had total plot area of 9620 sq. mtrs for development after reduction on account of common plot and roads etc. Thus, it was eligible to construct super built up area of 15392.40 @ 1.6 FSI. The assessee had constructed a housing project by deploying construction of 3573.48 sq. mtrs of FSI. Thus, the FSI of 3573.48 sq. mtrs. Has been utilized for the construction of the same, out of permissible FSI of 15392.40 sq. mtrs. The profits ensuing from entire project for the year as per the profit and loss account, includes additional profit attributable to sale of unutilised FSI has also been booked by the assessee firm. Since the eligible profits for claim of deduction u/s. 80IB(10) can only relate to those from the project of development and construction, the profits attributable to the sale of unutilised FSI not relating to development and construction undertaken shall not become eligible for the said claim.

He noted that considering the land area and FSI of 1.6, the assessee had 15392.40 sq. meters of construction available for development. As against which, the assessee consumed only 3573.48 sq. meters of FSI and 11818.92 sq. meters remained unutilised. He segregated the assessee's profit from sale of FSI out of the total figure of Rs. 26.99 lacs claimed as profit from sale of housing units.

10. The assessee carried the matter in appeal. CIT (Appeals), rejected the entire claim u/s 80IB(10) of the Act and therefore, did not find it necessary to examine this separate aspect of claim for deduction u/s 80IB(10) of the Act. He observed as under:

16. In view of the discussions given above, I do not intend to interfere with the action of the Assessing Officer in disallowing the claim of deduction u/s. 80IB(10) hence the same is confirmed. Since the disallowance has been confirmed in toto the alternative finding regarding profits attributable to sale of unutilized FSI is not required to be considered.

11. The assessee then carried the matter in appeal before the Tribunal. The Tribunal allowed the assessee's appeal making following observations:

...On verification of the sale deed executed in favour of the 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 Sec. 80IB(10) by utilizing the maximum FSI.

64. The AO states further that in the approved lay out 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-?-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.

65. The AO observes 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 u/s 80IB of the Act have no force; that the assessee has claimed deduction u/s 80IB of the Act for the 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 a unrestrictive bundle of rights attached with the sale of land plot. As aforesaid, there is no requirement as to FSI under the scheme of provisions of Sec. 80IB(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 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.

12. In rest of the appeals, facts are similar. Relevant data in such appeals, as provided by the counsel for the assessee, is as under:

13. The question is, in such facts, whether the Revenue was correct in segregating the assessee's profit from sale of housing units and denying the

benefit of deduction u/s 80IB(10) of the Act to the extent the same was relatable to the sale of unutilized FSI or whether the Tribunal was correct in holding that since the assessee fulfilled the conditions of section 80IB(10) of the Act, no part of the claim could be disallowed.

14. Appearing for the Revenue, learned counsel Shri Ketan Parikh contended that the assessee had utilized only a small portion of the available FSI in development of the housing project. The units constructed and sold by the assessee, therefore, had inbuilt element of unused FSI. The purchasers would be entitled to carry out extensive further construction utilizing the remaining FSI. The idea behind giving deduction u/s 80IB(10) of the Act was to make residential units for middle income group citizens at affordable cost. Various conditions contained in the said section would bring out this purpose. Granting benefits of section 80IB of the Act in the present case would frustrate such purpose.

15. Counsel further contended that the profit relatable to sale of unused FSI cannot be stated to have been derived from the assessee's activity of development and construction of housing project. For such purpose, he relied on the following decisions:

- (1) In the case of Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore, .
- (2) In the case of Pandian Chemicals Ltd. Vs. Commissioner of Income Tax, .
- (3) In the case of Liberty India Vs. Commissioner of Income Tax, .

16. Learned counsel Shri M.R. Bhatt who appeared at our request contended that the sale of unutilized FSI cannot be considered as a part of development of a housing project. Profit relatable to such activity, therefore, must be excluded for the purpose of deduction u/s 80IB(10) of the Act. He relied on a decision of this Court in the case of Commissioner of Income Tax Vs. Gautam Sarabhai Trust, in which in the context of exemption u/s 47 of the Act from payment of capital gains on amalgamation of companies, the Court ruled that such exemption would be available only to transfer of shares on amalgamation and if besides the share or shares in the amalgamated company, the shareholder is allotted something more, such as bonds or debentures in consideration of the transfer of his share or shares in the amalgamating company, he cannot get benefit u/s 47(vii) of the Act.

17. Learned advocate Shri Nitin Mehta adopted the same arguments and drew our attention to a decision of the Delhi High Court in the case of Honda Siel Power Products Ltd. Vs. Commissioner of Income Tax, in which the Court held that the profits derived from industrial undertaking from sale of imported machinery and spare parts used for providing after sale service is not profit derived from such industrial undertaking and the assessee would not be entitled to special deductions u/s 80HH or 80I of the Act.

18. On the other hand, learned counsel Shri Saurabh Soparkar appearing for the

assessee opposed the appeals contending that the only requirement u/s 80IB(10) of the Act is development and building of housing project, of course, within the parameters laid down therein. In the present case, it is not even the ground of the Revenue that any of the conditions were breached. Merely because a portion of the FSI available for construction was not fully utilized would not disentitle the assessee from such deduction. In case of M/s. Moon Star Developers, he pointed out that almost entire ground floor area available for construction was so covered by the housing units constructed by the assessee. Full FSI on the ground floor was thus utilised. The assessee had put a scheme of residential units with only ground up floor. The Revenue cannot compel the assessee to design the residential units in a particular manner. To utilize the full FSI, the assessee would have to build three additional floors. There is nothing in the section that compels the assessee to do so.

19. Counsel submitted that in the present case, the entire profit of the assessee was derived from development of a housing project. There was no segregation between sale of residential unit and the unutilized FSI. Such FSI is part and parcel of the residential units constructed by the assessee and sold to the purchasers. There is nothing on record to suggest that the purchasers carried out further extensive construction soon after the sale of the units.

20. Counsel contended that being an exemption scheme aimed at encouraging the activity of construction of residential units, the same should be liberally construed. For such purpose, he relied on the following decisions:

(1) In the case of Commissioner of Income Tax, Amritsar Vs. Straw Board Manufacturing Co. Ltd., .

(2) In the case of Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-II, Bombay, .

21. He contended that even if the scheme was to be strictly construed, once the assessee was covered within the scheme, the terms of the scheme for exclusion should be liberally constructed. In this context, he relied on decision in the case of Commissioner of Central Excise, Surat-I Vs. Favourite Industries, .

22. He lastly contended that the entire profit arose out of development of housing project and sale of residential units so constructed. He drew our attention to the decision of this Court in the case of Nirma Industries Limited Vs. Deputy Commissioner of Income Tax, in which the assessee had received interest from trade debtors towards late payment of sale consideration. It was held that such interest would be included in the profits of the industrial undertaking and therefore eligible for deduction u/s 80I of the Act.

23. Having heard the learned counsel for the parties and having perused the documents on record, we may briefly recapitulate the facts. The respondents-assessee were engaged in development of housing projects. In the case of M/s. Moon Star Developers, against the total FSI of 15312 sq. meters available for

construction, area of only 3573 sq. meters was utilised. The residential units were constructed only on the ground floor carrying no further construction. Such residential units were sold and the entire surplus was claimed as profit derived from activity of developing housing project deductible u/s 80IB(10) of the Act. Facts, with minor differences, are similar in all the cases.

11.03.2014

24. Section 80IB(10) of the Act pertains to deduction in respect of profit and gains from certain activities. Sub-section (10) thereof, as is well-known, grants 100% deduction on the profit of an assessee being an undertaking developing and building housing projects on the profit derived from such housing project subject to conditions laid down therein. Sub-section (10) of the section 80IB as it stood at the relevant time read as under:

(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March 2005 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,

(b) the project is on the size of a plot of land which has a 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.

We may notice that subsequently an explanation came to be added at the end of the said sub-section by Finance Act of 2009 but with effect from 1.4.2001 which explanation read 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).

In the notes on clauses explaining the introduction of section 80IB of the Act, in the context" of sub-section (10) thereof, it was stated as under:

The provision also seeks to provide that for approved housing projects the profits of which are fully deductible, the built-up area in regions other than outside twenty-five kms. of municipal limits of Delhi and Mumbai, the built-up area of the residential units does not exceed one thousand five hundred square feet.

25. In the budget speech for the financial year 1999-2000, the Finance Minister in the context of tax benefits u/s 80IA of the Act on housing projects, while

increasing the maximum limit of the built-up area of the units from 1000 sq. ft. to 1500 sq. ft. at all locations except Mumbai and Delhi, stated as under:

98. The second element of this incentive package relates to the scheme for housing projects for enjoying a tax holiday u/s 80IA of the Income Tax Act. The existing provision, inter-alia, requires that the built-up area of dwelling units should not exceed 1000 sq. feet. There have been many representations that in towns other than Mumbai and Delhi, the land cost is relatively less, and therefore, for the same capital expenditure investors can afford to purchase dwelling units of slightly larger areas. In view of this, it has been represented that the ceiling on built-up areas for dwelling units in approved projects be increased from 1000 sq. ft. to 1500 sq. ft. at all locations except Mumbai and Delhi. I propose to accept this suggestion and make suitable modifications in the law. This amendment in the scheme for treating housing projects as infrastructure will, I believe, also give a significant fillip to construction activities in the small towns.

26. The said provision was added for easing the housing problem particularly for the middle income group in urban areas. In this context, in the decision of this Court in *Radhe Developers*, it was observed as under:

30. The essence of sub-Section (10) of Section 80IB, therefore, requires involvement of an undertaking in developing and building housing projects approved by the local authority. Apparently, such provision would be aimed at giving encouragement to providing housing units in the urban and semi-urban areas, where there is perennial and acute shortage of housing, particularly, for the middle income group citizens. To ensure that the benefit reaches the people, certain conditions were provided in sub-Section(10) such as specifying date by which the undertaking must commence the developing and construction work as also providing for the minimum area of plot of land on which such project would be put up as well as maximum built up area of each of the residential units to be located thereon. The provisions nowhere required that only those developers who themselves own the land would receive the deduction u/s 80IB(10) of the Act.

27. It can thus be seen that deduction u/s 80IB(10) of the Act was granted to give fillip to the construction of residential units for persons of middle income group in urban and semi-urban areas of large cities and even small towns where there would be dearth of supply of such residential units. Some of the essential conditions for claiming such deduction are:

- (a) that the housing project should be approved by the local authority before a specified date (which was extended from time to time);
- (b) that the undertaking commenced development and construction of the housing project after a specified date;
- (c) that the project is on the size and plot of land which is of minimum of one acre;

(d) That each residential unit has a maximum built up area of 1500 sq. feet barring cities of Mumbai and Delhi and within a radius of 25 km of municipal units of such cities where such area should not exceed 1000 sq. ft.

Further conditions were later on added which included restriction of not allotting more than one residential unit to any person who is not an individual. In case of allotment of residential unit to an individual, it was further provided that no other residential unit in such housing project be allotted to such individual or his/her spouse, minor children or Hindu undivided family if such individual is a karta and any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.

28. At the relevant time, these later conditions were not in operation. Nevertheless, what can be seen from the conditions which prevailed at the relevant time is that deduction was aimed at providing 100% tax exemption to an undertaking which was involved in developing and building of housing projects in order to make affordable residential units available for middle income group citizens in urban and semi-urban areas. To ensure even distribution of such units and to avoid hoarding, additional conditions in the form of restriction on allotment to same person or his near relatives were added.

29. In this context, we may examine, whether the decision of the Assessing Officer to treat the income of the assesseees from sale of FSI separate and excludable from the purview of section 80IB(10) of the Act? The concept of FSI, is a well known one. Local authorities, such as Corporations, Municipalities and Panchayats, frame regulations for regulating activities of development of lands within their local areas. Such regulations are popularly referred to General Development Control Regulations (GDCR). In addition to providing different zones controlling development activities in different areas for regulated and orderly development of urban areas, these regulations also provide for various other details such as maximum height upto which the construction can be carried out, maximum area on the ground floor or on other floors which can be covered under construction, margin to be left on sides, parking facilities to be provided depending on the nature of building and most importantly, the maximum construction that can be carried out on a given piece of land. The last element, namely, the ratio of the land area versus the maximum construction permissible on such land, is referred to as floor space index (FSI for short). It is this FSI which will decide the maximum area of construction that can be carried out on any given piece of land. It is, therefore, not difficult to appreciate that besides several other factors of situational and other advantages and disadvantages, FSI permissible for the land in question would be an important factor in the context of development of the land. Given all other factors same, higher the FSI, the greater the value of the land.

30. It is in this context, we have to appreciate the under-utilization of the FSI by the assesseees in different housing projects under consideration. From the figures recorded in the earlier portion of the judgment, we can gather that such

utilization of the FSI by the assessee ranges from the minimum of 11.14% of the full FSI available to a maximum of 65.81%. In majority of the cases, the assessee has covered barely about one-fourth or one-third of the permissible FSI.

31. For any commercial activity of construction, be it residential or commercial complex maximum utilization of FSI is of great importance to the developer. Ordinarily, therefore, it would be imprudent for a developer to under-utilize available FSI. Sale price of constructed properties is decided on the built up area. It can thus be seen that given the rate of constructed area remaining same, non-utilization of available FSI would reduce the profit margin of the developer. When a developer therefore utilizes only say 25% of FSI and sells the unit leaving 75% FSI still available for construction, he obviously works out the sale price bearing in mind this special feature. Let us compare two instances. In the same area two residential schemes are developed. Both have residential units of 1500 sq. feet. In one scheme 100% FSI is used in another 25% FSI is used and 75% is passed on to the buyer of the unit. Price of the unit in the later scheme would for apparent reason be considerably higher than the former because the buyer there gets not only a residential unit of 1500 sq. feet, he also gets the right to build further construction of 4500 sq. feet. Whether this includes open land or not is not important. In terms of construction business, it is equivalent to sale of land. Thus, therefore, when a developer constructs residential unit occupying a fourth or half of usable FSI and sells it, his profits from the activity of development and construction of residential units and from sale of unused FSI are distinct and separate and rightly segregated by the Assessing Officer.

32. It is true that section 80IB(10) of the Act does not provide that for deduction, the undertaking must utilize 100% of the FSI available. The question however is, can an undertaking utilize only a small portion of the available area for construction, sell the property leaving ample scope for the purchaser to carry on further construction on his own and claim full deduction u/s 80IB(10) of the Act on the profit earned on sale of the property? If this concept is accepted, in a given case, an assessee may put up construction of only 100 sq. ft. on the entire area of one acre of plot and sell the same to a single purchaser and claim full deduction on the profit arising out of such sale u/s 80IB(10) of the Act. Surely, this cannot be stated to be development of a housing project qualifying for deduction u/s 80IB(10) of the Act. This is not to suggest that for claiming deduction u/s 80IB(10) of the Act, invariably in all cases, the assessee must utilize the full FSI and any shortage in such utilization would invite wrath of the claim u/s 80IB(10), being rejected. The question is where does one draw the line. In our opinion, the issue has to be seen from case to case basis. Marginal under-utilization of FSI certainly cannot be a ground for rejecting the claim u/s 80IB(10) of the Act. Even if there has been considerable under-utilization, if the assessee can point out any special grounds why the FSI could not be fully utilized, such as, height restriction because of special zone, passing of high tension electric wires overhead, or any such similar grounds to justify under

utilization, the case may stand on a different footing. However, in cases where the utilization of FSI is way short of the permissible area of construction, looking to the scheme of section 80IB(10) of the Act and the purpose of granting deduction on the income from development of housing projects envisaged thereunder, bifurcation of such profits arising out of such activity and that arising out of the net sell of FSI must be resorted to. In the present case, none of the assesseees have made any special ground for non-utilization of the FSI.

33. The contention of the counsel for the assessee that as long as there has been 100% utilization of the maximum permissible area on the ground floor, deduction u/s 80IB(10) of the Act cannot be declined, cannot be accepted. As noted earlier, in case of M/s. Moon Star Developers and many other assesseees, such full utilization of the ground floor area available for construction resulted into barely 20% to 25% of the FSI being used, remaining more than 75% being left unused.

34. What is available for deduction u/s 80IB(10) of the Act is the profit of an undertaking derived from developing and building a housing project. Mere sale of open land or unused FSI as part of the housing project where utilization of the FSI is way short of permissible limits cannot be said to have been derived from such housing project. Terms "derived from", "arising out of" and "attributable to" are often times used in the context of income tax in different connotation. In the case of Sterling Foods (supra), the assessee was engaged in processing prawns and other sea food which it exported. In the process, the assessee earned import entitlements to use itself or sell the same to others. During the year under consideration, the assessee included such sale proceeds for claiming relief u/s 80HH of the Act, in case of any profit or gain derived from an industrial undertaking in backward areas. In this context, the Apex Court held that the import entitlements cannot be said to be derived from the industrial undertaking of the assessee. For the application of the words "derived from", there must be a direct nexus between the profits and gains and the industrial undertaking and in the case on hand, the nexus was not direct but only incidental.

35. In case of Pandian Chemicals Ltd. (supra), once again, the assessee claimed deduction u/s 80HH of the Act. This claim included interest on deposit made with Electricity Board for supply of electricity. The Apex Court held that the interest derived by the industrial undertaking of the assessee on such deposits made with the Electricity Board cannot be said to flow directly from the industrial undertaking itself and was not profit earned or gain derived by the undertaking for the purpose of special deduction u/s 80HH of the Act.

36. In the case of Liberty India (supra), the assessee was engaged in infrastructure development and claimed deduction u/s 80I, 80IA and 80IB, etc. on the draw back receipts and DEPB benefits. The Court held that such income cannot be stated to be derived from the industrial undertaking.

37. The case of Nirma Industries Ltd. (supra) rested on different facts. It was a case where the assessee had claimed deduction u/s 80IA of the Act. Such claim

included the interest received from trade debtors towards late payment of sale consideration. This became a matter of dispute between the assessee and the Revenue. The Court held in favour of the assessee holding that such additional consideration can also be stated to be derived from the business. It was observed that when the purchaser pays a higher sale price, if it delays payment of sale proceeds, there is a converse situation to offering of cash discount. In principle, thus the transaction remains the same and there is no distinction as to the source.

38. In view of the above discussion, the question is answered in favour of the Revenue. All Tax Appeals to this extent are allowed. Respective decisions of the Tribunal are reversed to that extent. Appeals are disposed of accordingly.