

Shree Parshwanath Construction ... vs Department Of Income Tax on 10 October, 2014

IN THE INCOME TAX APPELLATE TRIBUNAL
" B " BENCH, AHMEDABAD

BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER And
SHRI KUL BHARAT, JUDICIAL MEMBER

./I.T.A. No.1797/Ahd /2011
(/ Assess ment Year : 2008-09)
The ACIT (OSD) / M/s.Shree Parshwanath
Circle-9 Vs. Construction Corporation
Ahmedabad 50, Harsiddh Chambers
3 rd Floor, Ashram Road
Ah medabad
/ PAN/GIR No. : AARFS 1767 P
(/Appellant) .. (/ Respondent)

/ Appellant by : Shri Dinesh Singh, Sr.DR
/Respondent by : Shri M.G. Patel, A.R.

i / Da te o f He a ring 17/09/2014
¢f /Da te o f Pr o no unceme nt 10/10/2014

/ / O R D E R

PER SHRI KUL BHARAT, JUDICIAL MEMBER :

This appeal by the Revenue is directed against the order of the Ld.Commissioner of Income Tax(Appeals)-XV, Ahmedabad ('CIT(A)' in short) dated 26/05/2011 pertaining to Assessment Year (AY) 2008-09. The Revenue has raised the following grounds of appeal:-

- 1) The ld.Commissioner of Income-tax(A)-XV, Ahmedabad has erred in law and on facts in deleting the disallowance amounting to Rs.1,42,90,342/- made by the Assessing Officer u/s.80-IB(10) of the Act.
- 2) The ld.Commissioner of Income-tax(A)-XV, Ahmedabad has erred in holding that the assessee fulfills the conditions laid down for The ACIT vs.M/s.Shree Parshwanath Construction Corpn.

Asst.Year - 2008-09 claiming deduction u/s.80IB(10) even when the land was in the name of New Amar Park Co-operative housing Society Ltd., which is a separate legal entity in the eye of law and the assessee entered into the project by a development agreement with the Society. The entire responsibility to execute the housing project and abide by the terms and conditions of its approval

right from the inception of the project till its completion rests with the Society. Assessee was just a contractor of the land owners constructing 128 residential flats AND not a developer.

3) On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (A)-XV, Ahmedabad ought to have upheld the order of the Assessing Officer.

4) It is therefore, prayed that the order of the Ld. Commissioner of Income-tax(A)-XV, Ahmedabad may be set-aside and that of the Assessing Officer be restored.

2. Briefly stated facts are that the case of the assessee was picked up for scrutiny assessment and the assessment u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was framed vide order dated 29/11/2010, whereby the Assessing Officer (AO in short) disallowed the claim of the assessee for deduction u/s.80IB(10) of the Act. Against this, assessee filed an appeal before the ld.CIT(A), who after following the decision of this Tribunal (ITAT Bench 'A' Ahmedabad) rendered in the case of M/s.Shakti Corporation, Baroda in assessee. Now, the Revenue is in appeal before us.

3. The ld.Sr.DR Shri Dinesh Singh vehemently argued that the order of the ld.CIT(A) is not justified in deleting the disallowance claimed u/s.80IB(10) of the Act. He supported the order of the AO and submitted that the assessee is merely a work contractor, therefore assessee is not eligible for deduction u/s.80-IB(10) of the Act.

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Asst.Year - 2008-09 3.1. On the contrary, ld.counsel for the assessee supported the order of the ld.CIT(A) and submitted that the issue is squarely covered by the judgement rendered in the case of CIT vs. Radhe Developers reported at (2012) 341 ITR 403 :: 204 Taxman 543:: 17 taxmann.com 156 (Guj.) and followed in other judgements of the Hon'ble Gujarat High Court in the case of CIT vs. Mahadev Delopers reported at (2013) 214 Taxman 130 (Guj.) and CIT vs. Prathama Developers reported at (2013) 214 Taxman 131 (Guj.). Further, the ld.counsel for the assessee relied on the following judgements:

1. CIT vs. Vishal Construction Co. reported at (2013) 217 Taxman 96 (Guj.).

2. CIT vs. Shree Ram Construction reported at (2013) 215 Taxman 17 (Guj.)

3. CIT vs. Nikhil Associates reported at (2014) 45 taxmann.com 278 (Guj.).

3.2. The ld.counsel for the assessee drew our attention towards to clauses, 13, 15, 18, 22 and 23 of the Development Agreement. He submitted that a bare perusal of the agreement would demonstrate that all risks and consequences thereof arising from the project was borne by the assessee. He submitted that the issue is squarely covered by the judgement of Hon'ble Gujarat High Court rendered in the case of Radhe Developers (supra).

4. We have heard rival submissions, perused the material available on record and gone through the orders of the authorities below. We find that the AO disallowed the claim of deduction on the basis that the assessee is not a developer and builder as envisaged u/s.80IB(10) of the Act because the assessee did not conceptualize and own the project in as The ACIT vs.M/s.Shree Parshwanath Construction Corpn.

Asst.Year - 2008-09 much as the assessee is not the owner of the land and the approval was not issued to it by the local authority. The project was undertaken by the assessee on the request of the Society. The assessee is merely confirming party to the sale-deed and, therefore, the assessee is merely a work contractor in terms of the amendment in the provisions of section 80IB(10) of the Act. However, the Id.CIT(A) deleted the addition by observing as under:-

"5. It is seen that the AO has not disputed that the appellant did not fulfill any of the conditions specified in section 80IB(10) from clause (a) to (d) with respect to the approvals from the local authority, completion of project within the specified time limits, one acre of land condition, 1500 sq.ft. built up area condition of each unit in the project and that of percentage of construction for commercial use. His objection is that the appellant is not the owner of the land. This objection of the AO has to be seen in the light of the tests laid down by Hon'ble ITAT Bench A Ahmedabad decision in the case of M/s.Shakti Corporation, Baroda in ITA No.1503/Ahd/2008 in AY 2005-06 wherein Hon'ble ITAT has held that where the appellant is found having practically purchased the land and has borne the risk of development deduction should be allowed. Here the appellant has been found fulfilling the conditions laid down in section 80IB(10) of the Income Tax Act and has also been found meeting the tests laid down in Hon'ble ITAT Bench A Ahmedabad decision in the case of M/s.Shakti Corporation, Baroda in ITA No.1503/Ahd/2008 in AY 2005-06 as it had practically purchased the land as clear from the P&L account where Rs.73,97,426 has been debited as land cost and cheque payments made to New Amar Park Cooperative Housing Society from its bank account and it had borne the entire cost and risk of developing the project as clear from Clause 15 of the Development Agreement, which clearly states that the profit was to be of the appellant, therefore in my view it is eligible for deduction u/s.80IB(10) and the AO is directed to allow the same."

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Asst.Year - 2008-09 4.1. In the present case, the AO has disallowed the claim of deduction on the basis that the assessee was not the owner of the land and the approval was in the name of the Society. Moreover, in the sale-deed executed, the assessee is only a confirming party. As per clause 13 of the Development Agreement, the assessee was entitled to enter into an agreement of booking/allotment with the prospective members, of the tenements, flat & shops to be constructed, on such terms and conditions as the developer/builder may deem fit and proper. Further, as per clause 15 of the Development Agreement, the assessee was entitled to the surplus between:

(i) The gross amounts received from the members/purchasers towards allotment of the tenements, flats & shops with facilities, amenities and services for the exclusive or general use, occupation and enjoyment (being the premises of every description whatsoever like open land, constructed premises, terraces, margin lands parking spaces (constructed, covered or open), other amenities, facilities and services or any other).

and

(ii) The total cost consisting of :

a) All cost and expenses for the acquisition of the said land incurred by the society including the payment towards stamp duty, legal fees and other charges and expenses paid or incurred to be paid for purchase or acquisition thereof and also including the interest paid and/or to be paid on amount borrowed for the said purposes and/or late payment to land owners for the purchase of the said land.

b) The cost to be incurred for construction, which shall include for labour, material, erection, installation or construction of infrastructures, common amenities facilities and services.

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c) Cost and expenses to be incurred for making arrangement for water supply, drainage, electricity and other facilities and services to be provided in the scheme, which shall include the laying of cables, pipe-lines, other installation charges, security deposits, scrutiny fees or any other amount to be paid or expenses to be incurred in any form whatsoever.

d) Cost and expenses of every discretion whatsoever to be incurred or paid for obtaining approvals or sanction to the layout plans, construction plans, revised plans from Taluka Panchayat or from any other concerned authority or authorities.

e) Cost and expenses to be incurred for obtaining all and every permissions, certificates, approvals, sanctions as may be necessary to be obtained from any authority or authorities whatsoever in any of the matters of evolving, implementing and carrying out the scheme or generally under this agreement.

f) The interest and other charges required to be paid upon finance that may be raised or arranged from any source whatsoever including that raised by the Developer/Builder itself, as also upon any investments already made for timely completion of the Project.

g) Remuneration or charge to be payable to the consultants like Architects, Engineers, Structural Engineers, Contractors, Supervisors, Drainage Consultants, Electrical Consultants, Project Consultants etc. in any form whatsoever.

h) All costs, charges and expenses of every discretion whatsoever to be paid or incurred in any of the matters relating to the scheme not specifically provided herein or bear the deficit if any in case total cost as per clause.

(ii) above exceeds the gross receipts from members / purchasers as per clause (i) above.

4.2. Clauses 16, 17, 18, 19, 20, 22, 22 & 23 are as under:-

16. The Developer/Builder shall be entitled to advertise the scheme of construction of residential & commercial complexes on The ACIT vs.M/s.Shree Parshwanath Construction Corpn.

Asst.Year - 2008-09 the said property and shall be entitled to display sign-boards, neon signs and such advertisements on the said property.

17. All the capital investments like construction equipments etc. shall be made by the Developer/Builder only and the same shall be maintained by the Developer/Builder at its own cost.

18. The construction that may be raised as a part of the development of the said property shall be the absolute property of the Developer/Builder herein and the Developer/Builder shall further be entitled to booking/allotment/disposal of the same in a manner as it may be deemed fit and proper.

19. It has been agreed that all outgoing and Municipal taxes in respect of the said property authorized to be developed herein and in respect of the construction that may be raised thereon shall be borne and paid by the Developer/Builder herein only.

20. It has been agreed that the person..... be member and at the recommendation of the Developer/Builder herein, the Society shall recognize all such persons as members of the Society to/for whom the tenements, flats & shops to be constructed by the Developer/Builder are allotted/booked.

21. It is hereby agreed that the Developer/Builder shall covenant as follows, with the person/s to/for whom the tenements, flats & shops to be constructed on the said property are allotted/booked.

a) That such person shall become member of the Society on the recommendation of the Developer/Builder herein.

b) That such person shall be liable to observe and perform the bye-laws, rules and regulations of the Society and shall be bound by the same.

c) That such persons shall be enrolled as member of the Society only after full payment is made and the scheme is completed.

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22.The Society hereby grant to the Developer/Builder exclusive right to book/allot for/to any person, firms or companies for such consideration as the Developer/Builder may think fit and proper any tenement, flat & shop to be constructed on the said property and the Developer/Builder shall be entitled to receive from them the amount of price/value of construction, contribution towards land price, Legal expenses, maintenance deposit and other expenses.

23. It has been specifically agreed by and between the parties that in view of the fact that all necessary finance for development/construction of the said property has been agreed to be arranged by the Developer/Builder and therefore, under no circumstance, this Agreement shall be cancelled and/or shall liable to be cancelled and shall remain in force for the sole benefit of the Developer/Builder for the Development of the said property.

4.3. From the aforesaid terms and conditions, it is clear that as per Development Agreement, the assessee had to incur and bear all expenses of the development of the land, and it had right to allot possession of constructed units to members of housing project after developing housing project. Therefore, in our considered view, the issue is squarely covered by the judgement of Hon'ble Gujarat High Court rendered in the case of CIT vs. Radhe Developers reported at (2012) 341 ITR 403. The judgement of Hon'ble Gujarat High Court was followed by the subsequent judgement of Hon'ble Gujarat High Court rendered in the case of Cit vs. Shree Ram Construction reported at (2013) 215 Taxman 17 (Guj.), wherein the High Court has observed as under:-

"2. Having perused the orders on record with the assistance of learned counsel for the Revenue, we notice that the issue pertains to deduction under section 80IB(10) of the Act. The assessee had The ACIT vs.M/s.Shree Parshwanath Construction Corpn.

Asst.Year - 2008-09 claimed to have developed housing project and claimed such deduction. Revenue however, held belief that assessee was not the owner of the land and had developed the housing project for and on behalf of some other person. Tribunal relied on its own previous decision in case of Radhe Developers vs. ITO (2008) 23 SOT 420 (Ahd.) and ruled in favour of the assessee. Such decision of the Tribunal was challenged by the Revenue before this Court. In the judgement in case of CIT vs. Radhe Developers (2012) 341 ITR 403/204 Taxman 543/17 taxmann.com 156(Guj.), the High Court had rejected the Revenue's appeals making following observations:

"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, 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 authorized 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. *The ACIT vs. M/s. Shree Parshwanath Construction Corpn.*

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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.

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3. We are informed that such decision of this Court was challenged before the Supreme Court in case of ITO v. Shree Gokul Corporation and SLP came to be dismissed by order dated 27.7.2012.

4. Under the circumstances, this Tax Appeal is also dismissed."

4.4. Therefore, respectfully following the judgement of Hon'ble Gujarat High Court in the case of CIT vs. Radhe Developers(supra), we do not find any infirmity in the order of the ld.CIT(A), same is hereby upheld. Thus, grounds raised by the Revenue are rejected.

5. In the result, the appeal of the Revenue is dismissed.

Order pronounced in Court on the date mentioned hereinabove at caption page Sd/- Sd/-

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(N.S. SAINI)
ACCOUNTANT MEMBER

(KUL BHARAT)
JUDICIAL MEMBER

Ahmedabad; Dated 10 /10/2014

¥ . . , . . ./T.C. NAIR, Sr. PS

/ /Copy of the Order forwarded to :

1. / The Appellant
2. / The Respondent.
3. / Concerned CIT

4. () / The CIT(A)-XV, Ahmedabad

5. f , , / DR, ITAT, Ahmedabad

6. f § ¤ i / Guard file.

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