

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI. G. MANJUNATHA, ACCOUNTANT MEMBER**

ITA No.147/Bang/2016
Assessment year : 2009-10

Shri. Raja Reddy (HUF), 641, I 'D' Main, Domlur Layout, Bengaluru – 560 071. PAN : AAFHR 9408 G	Vs.	The Assistant Commissioner of Income-tax, Circle-7(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Smt. Sheethal Borkar, Advocate
Revenue by	:	Smt. Nandini Das, Addl. CIT

Date of hearing	:	03.09.2018
Date of Pronouncement	:	12.09.2018

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of CIT(A), *inter alia*, on the following grounds:

1. *The learned CIT (Appeals) has grossly erred in law and on facts in holding that the Appellant is not entitled to deduction under Section 80-IB(10) of the Act.*
2. *The learned CIT (Appeals) is not justified in holding that Section 80-IB(10) is applicable only to an undertaking involved in developing and construction by ignoring the legal position that Section 80-IB(10) is applicable to an undertaking of developing 86 building housing project and not developing 86 construction of housing project.*
3. *The learned CIT (Appeals) is not justified in holding that the Appellant is*

mere contributor of land ignoring fact that the Appellant himself was engaged in the business of real estate, had obtained requisite plan sanction, water 85 electricity for development of housing project.

4. The learned CIT (Appeals) is not justified in holding that the Appellant did not engage in developing but only contributed land for project ignoring that apart from land contribution the Appellant incurred sizeable expenditure in the development of housing project.

5. The learned CIT (Appeals) erred in not considering the issue with regard to the HUF property which has been divided between co-parceners and the assessing authority has worked out the capital gains in the hands of HUF rather than in the hands of co-parcener of HUF.

6. The learned CIT (Appeals) erred in not considering the issue with regard to the adopting of cost of construction at Rs.1,000/- per sq.ft. furnished by builder without considering the cost of construction per sq.ft as per valuation report of the CPWD approved valuer.

7. The learned CIT (Appeals) erred in not considering the issue with regard to the adoption of the total cost of project as furnished by builder by the assessing authority without considering the objections filed by the Appellant.

8. The learned CIT (Appeals) erred in confirming the levy of interest under Sections 234A, 234B and 234C of the Act.

9. For these and such other grounds that may be urged at the time of hearing, the Appellant prays that the appeal may be allowed.

2. During the course of hearing, the learned Counsel for the assessee has opted not to press ground Nos. 5 to 7. Therefore, these grounds are dismissed being not pressed. In the remaining grounds, the issue raised before us is with regard to entitlement of exemption of profit under section 80-IB(10) earned on sale of constructed flats. The facts in brief borne out from the record are that the appellant (HUF) filed return of income declaring total income of Rs.25,63,870/-, after claiming deduction under section 80-IB(10) of the Act. The appellant entered into JDA with SJR Builders dated 16.06.2004 under which the appellant has offered their land to the builder namely SJR Builders for construction of residential apartments. As per the agreement, the builder undertakes to put up a superstructure on that part or portion of land retained by the appellant in consideration of transfer of remaining part. It was further

explained before the AO that JDA is not a sale simpliciter, because there is an element of builder's contract with the only difference that the consideration is not cash, but in kind i.e., constructed portion on the retained land. In development agreement, the appellant has permitted the builder for construction of multistoried residential complex and not in the capacity of buyer but only as a builder. The AO rejected the claim of the assessee and has computed the capital gain in the hands of the assessee.

3. Assessee preferred an appeal before the CIT(A) with the submissions that assessee has fulfilled all the conditions required for claiming of exemption under section 80IB(10) of the Act. As per the agreement, the SJR Builders have propounded a scheme for constructing residential apartment to be built on the scheduled property, wherein a buyer of an undivided right and interest in the scheduled property will be allowed the right to construct or cause to be constructed, own and enjoy a special apartment in the building to be constructed on the scheduled property. Total area offered for construction is measuring 3 acres and 10 guntas. He has also invited the attention of the CIT(A) to various clauses of the JDA to demonstrate that assessee itself has also contributed in construction of the residential apartment. As per clause 5 of the JDA appellant has developed the land to bear all the deposits such as KEB, KPTCL and BWSSB by himself. As per clause 6, it was mutually agreed that effect of JDA will be implemented only at the time of space sharing agreement. As per clause 15 of the JDA, appellant has made available the scheduled property to the builder for construction of residential apartment and this Act shall not be construed as delivery of possession in time of section 53 of Transfer Property Act r.w.s. 2(47) of the Income Tax Act. Hence, till the space sharing agreement, the owner of the land has full livery to supervise the building under JDA and also to carryout the building activities and to sign all necessary papers that are required for the

purpose of getting sanction, getting various agency approval at appropriate time and also the appellant was ready to give support with regard to finance. Hence, the appellant was actively involved with the builder as a developer in developing the property as the JDA. He has also placed reliance on various judgments of Karnataka High Court in support of his contentions. The CIT(A) did not accept the contentions of the assessee and accordingly the claim of exemption under section 80-IB(10) was rejected.

4. Now the assessee has preferred an appeal before the Tribunal and reiterated his contentions. During the course of hearing, the learned Counsel for the assessee has invited our attention to various clauses of the JDA in order to demonstrate that assessee was actively engaged in the construction activities. After the construction, respective shares were divided among the assessee as well as the builder and they have sold it out accordingly. It was further contended that all conditions required to make the assessee eligible for exemption under section 80-IB(10) were fulfilled and the Revenue has not raised any dispute in that regard. It was further contended that the builder i.e., SJR Builders has only claimed exemption under section 80IB(10) with respect to profits earned by it on the sale of flats which fell in his share. He has also invited our attention to the orders of the Tribunal in the case of Abdul Khader Vs. ACIT 57/Bang/2011, judgment of the Karnataka High Court in the case of CIT Vs. Shrvanee Constructions (2012) 209 Taxman 0006, judgment of the Bombay High Court in the case of CIT Vs. Suresh L Wadhwa (HUF) (2015) 374 ITR 0541 (Bom), order of the Tribunal, Jaipur Bench in the case of DCIT Vs. Shri. Prem Kumar Sanghi in ITA No. 791/2017, in support of his contentions that the 80IB(10) deduction is to be given to the undertakings or the persons who construct the residential apartment. In these cases, more than one person was engaged in the construction activities and the exemption was given to all the persons involved in construction

activities with respect to the profit earned on sale of residential flats fell in their respective share. Therefore, claim of exemption under section 80IB(10) be allowed to the assessee in the light of aforesaid judgments.

5. The learned DR on the other hand has placed reliance upon the order of the lower authorities. She has also contended that assessee was not engaged in construction activities. The assessee has rather given his capital assets to the builder for raising construction thereon. Therefore, the profit earned on transfer of capital asset is exercisable to capital gain and not the business profit.

6. In rebuttal, the learned Counsel for the assessee has filed the assets and liabilities statements ending 31.03.2007 and 31.03.2008 in order to demonstrate that in earlier years, the assessee has converted the capital asset into stock-in-trade. Therefore, whatever profit is earned on sale of stock-in-trade, it would be business profit. Since before entering into JDA, capital asset was converted into stock-in-trade and construction was raised thereon, the profit earned on the sale of respective shares would be the business profit and would be eligible for deduction of the exemption under section 80IB(10) of the Act.

7. Having carefully examined the orders of authorities below and the material placed on record, we find that assessee own a substantial chunk of land and by virtue of JDA, assessee has allowed the SJR Builders to raise the construction thereon. We have also carefully perused the various clauses of the JDA and we find that it is not out right transfer of land to the builder for raising construction. By virtue of clause 5, the assessee has permitted the developers to develop the residential apartment on the scheduled property and the expenditure connected there with shall be borne by the developers. The assessee is required

to cooperate with the developers in preparatory works by signing application forms, indemnity bonds, affidavits, etc., for obtaining sanction and permission from the competent authorities. As per this agreement, the shares of constructed portion were to be allocated amongst the appellant to the developers. It has also been made clear through clause 15 that the scheduled property was made available to the developer for construction of residential apartment and this shall not be construed as delivery of possession in terms of section 53 of the Transfer Property Act. The time was also stipulated for the completion of the project. As per clause 17, the appellant or his authorized representatives, at all reasonable time, shall have right of inspection of progress of work and quality of work with prior intimation to developers. The complete set of sanctioned plans and copy of documents and drawings were also made available to the appellant prior to commencement of the construction work. The appellant and the developers, as per clause 19, shall bear the amount payable to KPTCL/BWSSB or other authorities required for permanent connections to the building, proportionately to their holding of super built area.

8. From the careful perusal of this agreement, it appears to us that the appellant was also engaged in the construction activities though at minimal. Appellant has contributed its land to the JDA for its development and the developer has made the investment in construction of flat. The details of flats were also filed before us where from we find that almost 58 flats fell in the share of first party i.e., the appellant and 193 flats fell in the share of the second party. Meaning thereby, share of the appellant may be less but it does not mean that the appellant was not engaged in the construction activity.

9. During the course of hearing, assessee has tried to demonstrate from the assets and liabilities statement as on 31.03.2007 and 31.03.2008 and the balance

sheet for the impugned assessment years 2007-08 and 2008-09 to demonstrate that before entering into this JDA, the capital asset was converted into stock-in-trade and capital gain on its transfer was also offered at the time of sale of flats. She has also tried to demonstrate that at the time of JDA, the land which was part of the stock-in-trade was contributed under JDA for the construction of residential apartments. Therefore, the profit earned on sale of flat would be a business profit. It was contended that the Revenue has not raised any dispute with regard to fulfilment of requisite conditions for claiming deduction of exemption under section 80IB(10) of the Act as the claim raised by developer was allowed with respect to shares of his profit. We have also examined the judgments referred to by the assessee and we find in those judgments, the claim of exemption under section 80IB(10) of the Act was allowed to both the parties of the JDA as both of them were engaged in construction activities. It is also an undisputed fact that the builder/developer has claimed deduction of exemption under section 80IB(10) with respect to the profits earned on the sale of flats fell in his share. Therefore, the assessee shall also be allowed for exemption under 80IB(10) with respect to the profit earned on sale of its flats. But during the course of hearing, a doubt was raised as to whether the assessee has converted his capital asset as a part of stock-in-trade before entering into JDA. As this aspect was never verified by the lower authorities though the assessee has placed the documentary evidence in support of his contentions, but it requires verification from the lower authorities. In the light of these facts, we are of the view that let this point be examined by the AO. If the assessee succeeds in demonstrating that land held as capital asset was converted into stock-in-trade before entering into JDA and the assessee itself has offered the capital gain accrued on conversion of capital asset into stock-in-trade while filing the return along with the claim of exemption of business profit earned on sale of flat of his share under section 80IB(10) of the Act. If the assessee succeeds in proving that

capital asset was converted into stock-in-trade, before entering into JDA, claim of exemption of deduction under section 80IB(10) be allowed.

10. Ground No.8 relate to the chargeable of interest under section 234A and 234B. Since ground is consequential in nature, it needs no independent adjudication. Accordingly, order of the CIT(A) is set aside and matter is restored to the AO in terms indicated above.

11. In the result, appeal of the assessee stands allowed for statistical purposes.

Pronounced in the open court on 12th September, 2018.

Sd/-

(G. MANJUNATHA)
Accountant Member

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore.

Dated: 12th September, 2018.

/NS/*

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Sr. Private Secretary,
ITAT, Bangalore.