

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1372 of 2011

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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

Versus

M/S AMALTAS ASSOCIATES....Opponent(s)

Appearance:

MR NITIN K MEHTA, ADVOCATE for the Appellant(s) No. 1

RULE UNSERVED for the Opponent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 04/10/2016

ORAL JUDGMENT**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Tax Appeal was admitted for consideration of following substantial question of law:

"Whether the Appellate Tribunal is right in law and on facts in allowing the deduction claimed by the assessee u/s. 80IB (10) of the Income Tax Act ?"

2. Respondent assessee for the assessment year 2006-07 had filed the return of income of declaring income of Rs.5,15,340/- after claiming deduction under section 80IB of the Income Tax Act, 1961 ('the Act' for short) on a sum of Rs.4.33 crores (rounded off). Case of the assessee was that the assessee had developed a housing project, income from which would be exempt in terms of section 80IB(10) of the Act. The Assessing Officer as well as the Commissioner rejected such a claim primarily on two grounds; one that the assessee was not a developer of a housing project, but had acted as a contractor. Secondly, that in some of the units, the built-up area was in excess of the maximum permissible limit, for the purpose of section 80IB(10) of the Act.

3. The Tribunal, allowed the assessee's appeal by

the impugned judgment and held that the assessee was a developer. The assessee had undertaken full responsibility of constructing the residential units and had also been responsible for the resultant profit or loss arising out of such venture. The assessee thus, had undertaken full risk. Regarding the Revenue's contention regarding excess built-up area, the Tribunal held that the open space attached to a penthouse, cannot be included in the term 'balcony'. The Tribunal was of the view that the case of the present assessee was same as the cases of Radhe Developers and Shakti Corporation, two sets of appeals, where the Tribunal had allowed the deduction under section 80IB(10) of the Act.

4. The decision of the Tribunal in case of Radhe Developers and Shakti Corporation, came up for consideration before this Court in case of **Commissioner of Income-Tax v. Radhe Developers**, reported in **[2012] 341 ITR 403 (Guj)**. The Division Bench of this Court confirmed the view of the Tribunal making following observations:

"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 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."

5. The judgment of the High Court in case of **Radhe Developers** (supra) was carried in appeal before the Supreme Court. The Special Leave Petition was

dismissed.

6. Learned counsel for the Revenue however, sought to draw two distinctions. He contended that in the present case, the terms of the agreement between the assessee and the society were different and the case of this assessee therefore, would not be governed by the ratio of **Radhe Developers** (supra). His second contention was that some of the units exceeded the maximum permissible built-up area. In a penthouse, according to the counsel, the open space adjoining the top floor constructed area of the unit would also form part of the built-up area of the unit.

7. Neither of these contentions can be accepted. The Tribunal in the impugned judgment has referred to the terms and conditions between the assessee and the society, from which, the Tribunal culled out that entire planning, sanctioning of plan, work of construction, development of the property was done by the assessee. The assessee would enroll the members and accept payments from such members. Entire sale consideration was received by the assessee from such members. As per the agreement, the assessee had to

provide the payment from construction, engage architect, engineer and site supervisor and also obtain necessary permission from AUDA. The Tribunal concluded that these conditions would show that the assessee was a developer and not a contractor. The case of the assessee would in background of such findings of the Tribunal be covered by the judgment of this Court in case of **Radhe Developers** (supra).

8. Section 80(14) of the Act contains definitions for the purpose of the said section. Clause-(a) thereof provides that built-up area means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, but does not include the common areas shared with other residential units. Thus, the built-up area would include inner measurements of a residential unit on the floor level added by thickness of a wall as also projections and balconies. This would however, exclude the common areas shared with other residential units. This exclusion clause of the common areas shared by other units cannot be applied in the reverse. In other

words, the moment a certain area is not shared but is exclusively assigned for the use of a particular residential unit holder, would not mean that such area would automatically be included in the built-up area. In order to be part of the built-up area, the same must be part of the inner measurements of a residential unit or projection or balcony. The open terrace space on the top floor of a building would not satisfy this description. It will also not be covered in the expression balcony. Term 'balcony' has been explained in Webster's Third International Dictionary (Unabridged) as unroofed platform projecting from the wall of a building, enclosed by a parapet or railing, and usually resting on brackets or consoles. It is often used as synonyms to gallery, loggia, veranda, piazza, porch, portico, stoop etc. In the context of residential or even commercial complexes, term 'balcony' has gained a definite common parlance meaning. It usually consists of a projection from a building covered by a parapet or railing and may or may not but usually is covered from the top. This term 'balcony' certainly would not include an open terrace adjoining a bedroom or any other constructed

area of a penthouse. The terrace is not a projection.

9. In the result, question is answered against the Revenue and tax appeal is dismissed.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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