IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
TAX APPEAL No. 546 of 2008
With
TAX APPEAL No. 1225 of 2009
With
TAX APPEAL No. 1177 of 2010
With
TAX APPEAL No. 727 of 2009
With
TAX APPEAL No. 1984 of 2009
With
TAX APPEAL No. 1991 of 2009
With
TAX APPEAL No. 1992 of 2009
With
TAX APPEAL No. 1983 of 2009
With
TAX APPEAL No. 1632 of 2009
With
TAX APPEAL No. 1362 of 2009
With
TAX APPEAL No. 1190 of 2009
With
TAX APPEAL No. 995 of 2009
With
TAX APPEAL No. 1166 of 2010
With
TAX APPEAL No. 1151 of 2010
With
TAX APPEAL No. 1157 of 2010
With
TAX APPEAL No. 1175 of 2010
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TAX APPEAL No. 1176 of 2010
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TAX APPEAL No. 1150 of 2010
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TAX APPEAL No. 1153 of 2010
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TAX APPEAL No. 1145 of 2010
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TAX APPEAL No. 1155 of 2010
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TAX APPEAL No. 1143 of 2010
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TAX APPEAL No. 1174 of 2010
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TAX APPEAL No. 1149 of 2010
With
TAX APPEAL No. 659 of 2010
With

TAX APPEAL No. 974 of 2008
With
TAX APPEAL No. 975 of 2008
With
TAX APPEAL No. 616 of 2009
With
TAX APPEAL No. 1499 of 2008
With
TAX APPEAL No. 1497 of 2008
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TAX APPEAL No. 1498 of 2008
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TAX APPEAL No. 996 of 2009
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TAX APPEAL No. 1986 of 2009
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TAX APPEAL No. 1989 of 2009
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TAX APPEAL No. 1982 of 2009
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TAX APPEAL No. 272 of 2010
With
TAX APPEAL No. 307 of 2010
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TAX APPEAL No. 1995 of 2009
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TAX APPEAL No. 1990 of 2009
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TAX APPEAL No. 1689 of 2009
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TAX APPEAL No. 1631 of 2009
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TAX APPEAL No. 271 of 2010
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TAX APPEAL No. 295 of 2010
With
TAX APPEAL No. 1586 of 2009
With
TAX APPEAL No. 1748 of 2009
With
TAX APPEAL No. 1472 of 2009
With
TAX APPEAL No. 1444 of 2009
With
TAX APPEAL No. 1473 of 2009
With
TAX APPEAL No. 1628 of 2009

THE COMMISSIONER OF INCOME TAX-I - Appellant(s)

Versus

RADHE DEVELOPERS - Opponent(s)

Appearance :
MR MR BHATT, SR. ADV. with MRS MAUNA M BHATT, MR RK PATEL, MR MK PATEL, MR BD KARIA and MR SR PATEL for Appellant(s) : 1,
MR SAURABH N SOPARKAR, SR. ADV. with MRS SWATI SOPARKAR, for Opponent(s) :

Date: 13/12/2011

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These appeals arise in similar factual background leading to a common question of law debated before us. These appeals are, therefore, being disposed of by this common judgment.

2. Since certain facts in two streams of cases are slightly different, we would record such facts in both sets of appeals.

3. In Tax Appeal No.546 of 2008 (M/s. Radhe Developers), the assessee had claimed deduction under Section 80IB(10) of the Income Tax Act, 1961 (" the Act" for short) of Rs.24,75,940/- on the premise that such income was derived from the business of the undertaking developing and building housing project approved by the local authority. To execute such housing project, the assessee had entered into a development agreement with Vinodbhai Nathabhai Patel (HUF) and others as party of the First Part and heirs of deceased Ambalal Motibhai Patel as party of the Second Part. In the said development agreement dated 18.5.2000, the assessee was referred as a party of the Third Part. The party of the Second Part represented the land owners and party of the First Part represented those, who had previously entered into an agreement to purchase such land. Under this development agreement, the assessee agreed to develop the land belonging to party of the Second Part on certain terms and conditions. We would refer to relevant terms and conditions at a later stage.

4. On the same day i.e. 18.5.2000, the land owners entered into an agreement to sell the land in question to the assessee. The assessee was described as purchaser and the original land owners i.e. the heirs of deceased Ambalal Motibhai Patel were described as party of the Second Part or the sellers.

5. The Assessing Officer, however, rejected the assessee's claim for deduction under Section 80IB(10) of the Act. The Assessing Officer was of the opinion that the assessee firm was not the owner of the land. Approval by the local authority as well as permission to develop the project and permission to commence construction were not in the name of the assessee firm. The Assessing Officer was also of the opinion that the assessee had merely acted as an agent or a contractor for construction of residential houses.

6. The assessee carried the matter in appeal. CIT(Appeals) vide order dated 19.9.2006 rejected the assessee's appeal. CIT(Appeals) put considerable stress on the requirement of ownership of the land to qualify for deduction under Section 80IB(10) of the Act. He was of the opinion that the

land is intrinsic and inalienable part of the housing project. No assessee, therefore, could carry on the business of undertaking developing and building housing projects without owning the land.

7. The assessee carried the matter further in appeal before the Income Tax Appellate Tribunal (" the Tribunal" for short). The Tribunal vide its impugned judgment dated 29.6.2007 allowed the assessee's appeal and reversed the orders passed by the Revenue authorities. The Tribunal based its order on two aspects. Firstly, the Tribunal was of the opinion that for deduction under Section 80IB (10) of the Act it is not necessary that the assessee must be the owner of the land. Second aspect of the Tribunal's judgment was that even otherwise looking to the provisions contained in Section 2(47) of the Act, read with Section 53A of the Transfer of Property Act, by virtue of the development agreement and the agreement to sell, the assessee had, for the purpose of Income Tax, become the owner of the land. The Tribunal, accordingly, allowed the assessee's appeal directing the Assessing Officer to grant deduction under Section 80IB(10) of the Act. The Revenue is, therefore, in appeal before this Court.

8. Second stream of appeals led by Tax Appeal No.733 of 2009 (M/s. Shakti Corporation) arises in the following background.

8.1 Here also the assessee had claimed deduction under Section 80IB (10) of the Act on the ground that the income was derived from the business of the undertaking developing and building housing projects approved by the local authority. The Assessing Officer disallowed the claim primarily on the ground that not being the owner of the land, the assessee was not eligible for deduction under Section 80IB(10) of the Act.

8.2 In appeal, CIT(Appeals) followed the decision of the Tribunal in case of M/s. Radhe Developers, which was by then available. This decision of CIT(Appeals) was challenged by the Revenue before the Tribunal. Revenue contended that the assessee's facts were different from those involved in the case of M/s. Radhe Developers. The Revenue pressed in service the decision of the Apex Court in the case of Faqir Chand Gulati vs. Uppal Agencies Private Limited and another reported in (2008) 10 SCC 345 to contend that for an assessee to seek benefit under Section 80IB (10) of the Act, he must show his ownership over the land in question.

8.3 The Tribunal, though did not accept the Revenue's stand; in view of the decision of the Apex Court in the case of Faqir Chand Gulati vs. Uppal Agencies Private Limited and another (supra), made a minor departure from its own decision in the case of M/s. Radhe Developers. The Tribunal confined its view in its judgment dated 7.11.2008 on the aspect of the ownership of the land. Considering the terms and conditions of development agreement and other documents on record, the Tribunal was of the opinion that the benefit of section 80IB(10) of the Act to the assessee could not be denied.

8.4 The Tribunal held that the assessee had acquired dominion over the land, which he had developed by constructing housing project incurring expenses and also taking risks. The Tribunal, however, observed that decision in the case of M/s. Radhe Developers would not apply in cases, where the assessee had entered into an agreement for a fixed remuneration and worked merely as contractor to construct the housing project on behalf of the land owners. In such a case, agreement between the assessee and the land owner would not permit the assessee to claim the benefit.

9. In the case of M/s.Shakti Corporation, since the assessee had produced documents on record, the Tribunal accepted its case for benefit under Section 80IB(10) of the Act. However, in group

of other cases, which the Tribunal was disposing off by the said common judgment, such documents were not readily available. The Tribunal remanded the proceedings to the Assessing Officer with a direction that the Assessing Officer should look into the agreement entered into in each case by the land owner and decide whether the assessee had in fact purchased the land for a fixed consideration and had developed a housing project at its own cost and risk. If it was so found, the Assessing Officer should allow the deduction under Section 80IB(10) of the Act. On the other hand, if the Assessing Officer found that the developer had acted on behalf of the land owner and received only a fixed consideration for developing the housing project, the assessee would not be eligible for deduction under Section 80IB (10) of the Act. This common judgment in the case of M/s. Shakti Corporation is also in appeal before us at the hands of the Revenue. We may record that the assessees have accepted the judgment and not carried the issue further before us.

10. While admitting Tax Appeal No.546 of 2008, the Division Bench of this Court had framed following substantial question of law:-

> "Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing deduction u/s.80IB(10) r.w.s. 80IB(1) to the assessee when the approval by the local authority as well as completion certificate was not granted to the assessee but to the landowner and the rights and the obligations under the said approval were not transferable, and when the transfer of dwelling units in favour of the end-users was made by the landowner and not by the assessee?"

11. We adopted this question for the purpose of all appeals involved in this group for the purpose of this common judgment.

12. Appearing for the Revenue, learned Senior Counsel Mr.M.R.Bhatt vehemently contended that the Tribunal erred in allowing deduction to the assessees under Section 80IB(10) of the Act, particularly, when admittedly the assessees were neither land owners nor necessary permissions for development from the local authorities were granted in the name of the assessees.

13. Taking us through the Legislative changes made from time to time in this regard, and drawing our attention to erstwhile Section 80IA (4F) of the Act and to the present Section 80IB(10) of the Act, counsel submitted that the provisions were made to give encouragement and fillip to the housing projects where acute shortage was felt in urban and semi-urban areas for middle class housing. Counsel submitted that without the land ownership, the assessee cannot be stated to be a developer of the land.

14. Counsel took us through various conditions in the agreements between the assessee and the land owners to contend that at best the assessee can be stated to have acted as contractor for developing of housing project for and on behalf of the land owners. Referring to the Explanation added to sub-Section (10) of Section 80IB of the Act by Finance (No.2) Act, 2009 with effect from 1.4.2001, counsel submitted that any assessee executing the housing project as a works contract would not qualify for deduction under Section 80IB(10) of the Act. Counsel submitted that the Tribunal in its judgment did not have the benefit of such explanation added with retrospective effect.

15. Counsel submitted that the Tribunal erred in holding that the assessees, by virtue of different agreements entered into with the land owners, could be treated to be owners of the land. In support of his contentions, counsel relied on following decisions:-

1). In the case of Faqir Chand Gulati vs. Uppal Agencies Private Limited and another (supra), wherein the Apex Court in the background of the Consumer Protection Act examined various terms of agreement between the land owner and the constructor to come to the conclusion that the land owner was a consumer and, could, therefore, lodge a complaint before the Consumer Forum with respect to deficiency in the construction carried out.

2). Counsel also relied on the decision in the case of K. Raheja Development Corporation vs. State of Karnataka reported in (2005) 5 SCC 162, wherein the Apex Court, in the background of the Karnataka Sales Tax Act, in view of the development agreement between the developers and the land owners held that such agreement was in the nature of the works contract as defined under the Karnataka Sales Tax Act. Counsel also relied on the decision of Commissioner of Income-Tax vs. Glenmark Pharmaceuticals Ltd. reported in [2010] 324 ITR 199 (Bom) to highlight distinction between the contract of sale and works contract.

16. Learned counsel Mr. Ketan Parikh for the Revenue also made similar submissions contending that the Tribunal had gravely erred in holding that for deduction under Section 80IB (10) of the Act, ownership of the land is not necessary and further that by virtue of agreements between the parties, the assessee had acquired ownership rights over the land in question.

17. On the other hand, learned Senior Counsel Mr. Saurabh Soparkar appearing for the assessees contended that Section 80IB(10) of the Act does not require that to qualify for deductions, the assessee had to own the land, which he was developing. Counsel took us through the legislative history leading to the present provisions of Section 80IB (10) of the Act. He also highlighted the meaning of terms “develop” and “developers” contained in various dictionaries.

18. Counsel contended that wherever ownership was necessary for claiming certain benefits, the Act had so provided. In the present case since no such specification is made, the Tribunal correctly interpreted Section 80IB (10) of the Act.

19. Counsel submitted that under the Gujarat Town Planing and Urban Development Act as also the General Development Act and Control Regulations (“GDCR” for short) applicable to the city of Vadodara (from where the appeals arise), there is no requirement that only the owner can develop a housing project on any land. He submitted that either owner, occupier or even the developer with the permission of the owner can develop the land after obtaining permission of the Local Authority.

20. Counsel further submitted that in any case, in so far as the Income Tax Act is concerned, by virtue of the provisions contained in Section 2(47) of the Act, read with Section 53A of the Transfer of Property Act, transfer of the land must be taken to have been completed.

Counsel submitted that any other view would lead to a situation where neither the land owner nor the assessee would be eligible for deduction under Section 80IB(10) of the Act. He submitted that any such interpretation should be avoided.

21. With respect to explanation added to sub-Section (10) of Section 80IB with retrospective effect from 1.4.2001, counsel submitted that the present cases do not involve execution of a housing project by way of works contract and in all cases, assessees had acted as developers.

22. Counsel relied on the following decisions:-

1) In the case of Mysore Minerals Ltd. vs. Commissioner of Income-Tax reported in [1999] 239 ITR 775, wherein the Apex Court, for the purpose of considering the depreciation of building, gave wide meaning to the term "owner" used in Section 32 of the Act to include even a person who was in possession of building on part payment of the price but in whose name the building was not yet registered.

2) In the case of Commissioner of Income-Tax vs. Podar Cement Pvt. Ltd. and others reported in [1997] 226 ITR 625, wherein also the Apex Court had occasion to touch on the aspect of ownership in the context of Section 22 of the Act. The Apex Court was of the opinion that the owner is a person who is entitled to receive income in his own right and Section 22 does not require registration of sale deed.

3) In the case of Commissioner of Income-Tax vs. Gwalior Rayon Silk Manufacturing Co.Ltd. (and other appeals) reported in 196 ITR 149 to contend that provisions for deduction and exemption should be construed reasonably. He also relied on the decision of the Apex Court in the case of Bajaj Tempo Ltd. vs. Commissioner of Income-Tax reported in 196 ITR 188, wherein the Apex Court observed that provisions contained for growth and development in the taxing statute should be interpreted liberally and such provision should be construed so as to advance objective of such provisions and not to frustrate them. Counsel also relied on the decision of the Apex Court in the case of Commissioner of Income-Tax vs. Hindustan Bulk Carriers reported in [2003] 259 ITR 449, wherein the Apex Court observed that construction which reduces the statute to futility has to be avoided. The statute or any enacting provision therein must be so construed as to make it effective and operative by giving liberal construction so as to uphold such provisions if possible.

4) He referred to the decision in the case of State of Andra Pradesh vs. M/s. Kone Elevators (India) Ltd., reported in AIR 2005 SC 1581, wherein the Apex Court discussed distinction between the works contract and sale.

23. Learned counsel Mr.R.K.Patel also appearing for the assessees supported the decision of the Tribunal contending that looking to the nature of agreements on record, the Explanation to Section 80IB(10) introduced with effect from 1.4.2001 would have no material impact. He submitted that the assessees had taken all crucial decisions and also taken the full risk of failure or success of such housing project. Profit and Loss both belonged to the assessee. The assessees were, therefore, entitled to deduction under Section 80IB (10) of the Act and rightly so held by the Tribunal.

24. Having thus heard learned counsel for the parties and having perused the documents on record, before adverting to the rival contentions, we may notice relevant conditions of the agreement between the parties. Since some of the conditions of the agreement are slightly different, we may record the relevant conditions of both the cases,namely, in case of M/s. Radhe Developers as well as in the case of Shakti Corporation.

25. As noted in the case of M/s.Radhe Developers, the assessee had entered into development agreement with the land owners and a group of persons representing the earlier intending purchasers. Such tripartite agreement dated 18.5.2000 provided inter alia as under:-

> "3. The party of the third Part are connected with the construction of business since many years and have experience of constructing residential houses.

4. With the consent of The Party of the First and Second Part, The Party of the Third Part as a developer and builder wants to do a project/scheme of constructing residential houses having area less than 1500 sq.ft. For the middle class society.

5. The Party of the First and The Party of the Third Part have executed one Agreement of Sale on 18-05-2000 accordingly on that basis the rights of agreement of Sale dated 7-9-91 at the rate of Rs.100/- per Sq.ft. Subject to other conditions written therein are decided to be purchased by the Party of the Third Part.

6. In fact in The Party of the First and Second Part confirming party have no necessary technical knowledge and skill pass through the said scheme to arrange for constructing residential houses having area less than 1500 sq.ft. for the middle class society and also have no finance to invest as per the size of scheme and to register the members for that required alertness and skill being absent they themselves are not in a position to place a project or scheme on the land mentioned in schedule in such circumstances to The Party of the Third part over and above the right to purchase the rights of Agreement of Sale on dt.18-05-2000 they have also decided to give all rights along with constructing and developing on the said land mentioned in schedule by this Agreement dt.18-05-2000.

7. xxx xxx xxx

8. On the land described in Schedule below the housing scheme is/shall be performed by the said Developer cum Building Contractor, that Scheme is to be named as “Mit Bunglows” that name shall remain permanent.

9. The said Developer cum Building Contractor by doing discussions with The Party of the First and Second Part confirming party, to bring the scheme in reality of constructing houses and get through it, has to do construction according to necessary plans, drawings, specifications and maps. Etc. go passed from Vadodara Municipal Corporation.

10. Regarding this Scheme The Party of the First and Second Part have appointed M/s. Sejal Architects and Engineers as Architects and as per requirement separate Structural Engineer is also appointed and his fees is to be paid by Developers cum Building Contractor, regarding the technical matters liking planning and design the decision of the said Architect shall be considered as final.

11. As stated above with the consent of The Party of the First and Second Part to do arrangement of construction of the following rights and authorities are given to the said Developers cum Builder.

1) To appoint Architect Engineers, Legal Advisor and such professionals whose services for completing this scheme is necessary and by deciding their area of operation to fix-up their remuneration and fees etc. and for that to bear all expenses, to execute agreements so that the construction work of this project can be completed successfully.

2) To complete this scheme as per his discretion he can given sub-contract, labour contract etc. but while doing such appointments it is to be kept in mind that the

responsibility of construction of this project is/shall be on him that is on Developer cum Contractor.

3) The said Developer cum Building Contractor is authorized to admit the persons who are willing to join in the scheme to get the houses of fixed area and in this manner to admit the respective member in the scheme or at the time of admission of such member as per the scheme the fixed amount of contribution of construction and other amounts and incidental expenses that the admitting members shall have to pay as admission fees the receipt of deposit or a clear receipt of amount contribution shall have to be given, moreover the Developer cum Building Contractor has given full right and authority also to decide the price of houses of this scheme and to execute necessary agreements with the purchasers of houses.

4) Whatever the construction contribution and other contributions or other deposits etc. that the said Developers cum Building Contractors shall from time to time demand from the respective members by issuing a legal notice and in this manner as per the notice of the Developer cum Building Contractor to the member admitted in scheme not paying the amount out of the deposit by deducting damages/loss remaining amount shall be returned and to delete the name of that admitted member the authority shall remain with the Developer Cum Building Contractor. Regarding this whatever decision that it shall be taken by the Developer Cum Building Contractor shall be agreeable and binding on the Party of the First Part.

5) As stated above when the name of admitted member is deleted the respective vacant place can be filled up by the new member or at the place of deleted member to admit a new member the said the Developer Cum Building Contractor is authorized.

6) The said the Developer cum Building Contractor as per the scheme whatever the changes he would do thereafter in nature of final scheme, the terrace, open land, ladder and common amenities shall be received by the member entering /admitting in th scheme as per the agreement he shall receive the property and the decision of the Developer cum Building Contractor of allotment of property to the respective person shall be final for The Party of the First and Second Part and shall be agreeable and binding to the person registered as a member without any dispute.

7) Developer cum Building Contractor is authorised, as and when necessary to complete the scheme for financial arrangement and facility can borrow it from any financial institute Bank or financier, Shroff and private party and for that to execute required promissory note, receipt, Hundi, mortgage deed and other Negotiable Instruments.

8) That the said Developer cum Building Contractor in order to complete the scheme in order step by step but in prescribed time period, The Party of the First and Second Part and all the members desirous in joining in the scheme Developer cum Building Contractor whenever and wherever they need the signatures and admissions, they shall have to give that to the Developer cum Building Contractor and in special circumstances Developer cum Building Contractor in order to complete the scheme in order step by step in prescribed time period, shall be

entitled to receive General Power of Attorney from The Party of the First and Second Part.

9) In order to complete the scheme as per arrangement plan and in prescribed time period, Developer cum Building Contractor has to all the proceedings at Government and Semi-government and Municipal Corporation Office and in legal Courts and at other places on behalf of The Party of the First and Second Part on necessary applications and written statements, replies and in the forms all that is to be done by Developer cum Building Contractor and for that hereby the authority and powers are given to him. In spite of that in future if any Specific power of Attorney is to be obtained at that time The Party of the First and Second Part shall have to execute that in favour of Developer cum Building Contractor.

10) To complete this scheme in the prescribed time period and for the purpose of admitting the members in the scheme, to give advertisement of the total or partial scheme in local news paper or to print out its booklet, to place sign board, neon board on site the rights and authorities are hereby given to the Developer cum Building Contractor.

11). That the said Developer cum Building Contractor as per this scheme, whatever construction he shall do on the land described in Schedule shall be authorized to allot to the respective member and also out of this land deducting the constructed land and deducting the land of margin and passage whatever excess land that shall remain then Developer cum Building Contractor shall have right to allot that land.

12) That by the said the Party of the First and Second Part have given all the authorities to Developer cum Building Contractor, for completing the scheme of constructing residential houses and incidental work there to and therefore the said Developer cum Building Contractor has to complete this scheme as per his own talents, whatever he deems proper as per his discretion and decisions. The accounts right from the implementation of this Agreement up to the completion of the project, Developer cum Building Contractor has to maintain in his office in his books of accounts and it is the liability and responsibility of Developer cum Building Contractor the Party of the Third part to fully recover the consideration from the members.

13) As per this scheme Developer cum Building Contractor has given incidental lump sum estimate of price for the residential houses to be constructed but as per the step-stage wise development of the scheme and as per the changes Developer cum Building Contractor is authorized to revise the estimate and that shall always be agreeable and binding to the members.

14) The land described in schedule below and the construction done on it, its actual possession shall be with Developer cum Building Contractor till the completion of this scheme and moreover till the total implementation of this agreement on the said land and the construction over it there shall be a contractual lien of the Developer cum Building Contractor.

15) With the consent of The Party of the First and Second Part the scheme taken on hand its liability of project is on Developer cum Building Contractor and therefore

during the working of the project in this scheme by the agreements or otherwise whatever the transactions are entered into with third parties the liability of those transactions shall be Developer cum Building Contractor and in this manner in the agreements with third parties The Party of the First and Second Part have/shall not have any liability hence any suit for loss, damages or compensation on site cannot be a liability of The Third Part of the First and Second Part.

16) The Party of the First and Second Part have handed over all the responsibilities of the scheme to the Developer cum Building Contractor so at present to the party of the first part as per rules and regulations he is getting F.S.I. but in future if changes take place in rules and regulation of F.S.I in such circumstances other than the present scheme on the land if Special construction is allowed then for such additional work other than total construction made, as per rules and regulations by getting passed the Plans from VMC. Vadodara to do the construction all the rights and Authorities shall be with Developer cum Building Contractor and thereafter also whatever F.S.I. Rights shall remain that also as per this agreement shall be with the party of the third part.

17) As per the project of total skill the properties that will be alloted for the Easy and successful administration and management of the property to constitute all necessary rules and regulations policies and bye-laws the rights and authorities shall be with Developer cum Building Contractor and those rules shall be agreeable and binding to all concerned parties.

18) xxx xxx xxx

19) Regarding the land, house and common facilities necessary deeds in favour of the persons purchasing the houses in the scheme are to be executed by all the three parties jointly.

20) xxx xxx xxx

21) xxx xxx xxx

22) xxx xxx xxx

23) xxx xxx xxx

24) The amount of total collection received from person becoming member in this scheme out of that the amount shall become payable to The Party of the First that is paid to Second Part by them and to The Party of the First shall be entitled to receive consideration as per the Agreement dt.18-5-2000 and after deducting that remaining all amount shall be received by The Party of Third Part as his remuneration."

26. As already noted, the assessee also entered into an agreement to purchase the same land on the same date i.e. on 18.5.2000. Under such agreement, the land owners agreed to follow important conditions:-

"7. For taking care of the above mentioned land, or for development you the party of the First Part is entitled to put fencing and/or put board showing your scheme at your cost.

8. For construction of the said land you party of First Part is entitled to put up revised maps prepared through your architect or engineer before Baroda Municipal Corporation as per your scheme, & get the necessary permission. And for this you can appoint engineer, contractor, architect, Builder, developers etc. And you can decide the conditions for this with them, by separate agreement."

27. In so far as M/s. Shakti Corporation is concerned, here also assessee entered into development agreement with the owners of the land which agreement had following important conditions:-

"(1) That the party of the Second Part (Assessee) shall upon obtaining all necessary permissions over the said land such as NA, NOC, Development Permission, Rajachiththi, permission for passing plans, Title Clearance, etc. for making the construction and erect an apartment in the same, can organize shops, offices, flats and tenement society and can engage architect if required, can prepare plans and obtain the occupation Certificate, Completion Certificate, can get the revised maps prepared and for which the complete powers are given to the party of the Second Part.

(2) The entire responsibility for carrying all legal proceedings in respect of aforesaid land shall be that of the Party if the Second Part and for that Purpose, the party of the first part are bound to subscribe signatures, consents, affidavits, if and when found necessary. However, the entire expenses that may be required to be incurred by the Second Party on the same cannot be recovered from the Party of the First part. With this clear-cut condition, this land is entrusted to you for making the development.

(3) On the basis of this Agreement, the party of the Second part herein is entitled to make advertisement by displaying the board in any other manner for the scheme over the land mentioned in the schedule.

(4) The party of the Second Part Developers can register the members for the new construction that may be made over the said land/property, can issue receipt to the members, can issue allotment letter to the members, can execute the Agreement to sale, can hand over the possession, can execute Tripartite Agreement, but the entire responsibility for the same shall be that of the party of the Second Part.

(5) That the party of the Second Part Developer has to make the construction as per the Rajachiththi issued by the Vadodara Municipal Corporation, i.e. construction permission over the property as described above and the entire expenses for the same is to be incurred by the Party of the Second part of its own and there will not be any responsibility of the party of the First Part in respect of the said amount of expenses.

(6) That the Developer can engage labour contract, building contractor or any other agency for making construction 01: the scheme organized over the aforesaid property and the party of the Second part is completely authorized to make separate

agreements with them for all such activities. That on the basis of present Agreement, if the party of the Second Part Developers will organize any scheme or project over the aforesaid property, in which may accept the complete amounts as stated in this agreement for shops, offices, flats etc. will be constructed for which we shall execute the Sale Deed in favour of members as and when you may intimate and cause registration and witnessing etc. on the sale deeds in the office of the Sub Registrar by presenting the same. However, the stamp, registration charges and other expenses for the same shall be borne by you, the Party of the Second Part or the purchasers of the said offices, shops, flats, houses etc.

(7) That for the houses, shops flats, etc. that are to be constructed over the said land for which the party of the Second Part is to register them as members and can upon executing Agreement to Sale etc. accept the money and issue receipts to the members. Same way, you can remove all obstructions that may come during the period of making the develop it.

(8) If required, the Party of the Second will raise necessary capital for making development and construction over the said land and can obtain the loan from the bank or any other institutions to complete the scheme and for that purpose can file a claim against such institutions for carrying out necessary proceedings and party of the Second part of its own whatever financial responsibility that may arise in a such works, shall be on the head of the party of the Second part Developers.

(9) That all activities relating to the construction is to be carried out by the Developer and if required, the party of the First Part has to extend necessary cooperation and assistance as a land owner. The expenses for the said works are to be borne by the party of the Second Part Developer.

(10) From the date of this Agreement, you, the Party of the Second Part is bound to pay tax, land revenue, special cess etc. in the offices of the Vadodara Municipal Corporation, Government, Semi Government and whatever tax, land revenue, eduction cess, special cess, etc. are outstanding prior to be the date of this Agreement, the same are and shall be paid by us, the party of the First part as a land owner.

(11) xxx xxx xxx

(12) That for performing development activity over the said land as well as for the publicity of the said scheme/project, the party of the Second part can print brochures, etc. and can publish advertisement, etc. of the same in the daily newspaper and prior to making construction over the said land, can construct a site office and for storing the building material, can construct the godown, etc. at its own cost.

(13) That the required facilities of water, drainage, etc. connections for the houses constructed over the said land as well as for electric connection from Gujarat Electricity Board shall be obtained and provided by the party of the Second Part at its cost and for that purpose, the party of the First Part herein is to extend necessary cooperation and assistance to the party of the Second part.

(14) xxx xxx xxx

(15) That the physical possession of the said land for performing development activity over the land is handed over by the Party of the First part herein to the Party of the Second Part herein"

28. From the above documents on record and the statutory provisions brought to our notice, it is necessary for us to examine whether the Tribunal was justified in granting benefit to the assessees under Section 80IB(10) of the Act. As already noted, the Tribunal in the case of M/s.Radhe Developers proceeded on the footing that Section 80IB (10) does not require that the developer must also be an owner of the land and further that in any case, the assessee by virtue of agreement with the land owners, should be deemed to have acquired ownership of the land in view of the provisions contained in Section 2(47) of the Act and Section 53A of the Transfer of Property Act. Taking into account the first limb of the Tribunal's decision, we notice that erstwhile Section 80IA of the Act was bifurcated with effect from 1.4.2000. The provision for deduction of income derived from development of housing project was introduced in Sections 80IB (1) and (10) of the Act, which for the purpose of these cases, at the relevant time, read as under:-

"**80IB**.(1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections(3) to [(11) and (11A)]] (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

(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 or 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 kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place."

29. From the above provisions it can be seen that Section 80IB(10) provided for deduction of the entire amount of profits of an undertaking derived from the business of developing and building housing projects which were approved by the Local Authority before the specified date. Such deduction, however, was subject to certain conditions, namely, that such undertaking had commenced development and construction prior to a specified date and that the project was on the size of a plot of land with a minimum area of 1 acre and the residential unit had maximum inbuilt area of 1500 sq.feet, (except in cases of cities of Delhi and Mumbai, where maximum area permitted was 1000 sq.feet.)

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 under Section 80IB(10) of the Act.

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 under Section 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 under Section 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 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 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.

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 In the case of Commissioner of Income-Tax vs. Glenmark Pharmaceuticals Ltd. (supra), the Bombay High Court observed as under:

> "*Contract of work or a contract of sale*
>
> 14. The question as to whether a contract is a contract of work or a contract of sale is the subject-matter of precedents on the subject. The principles, as decided cases

would show, are well defined but the application of those principles to individual cases often poses a difficulty. The consistent line of thinking that emerges from the decided cases is that essentially, in determining as to whether a contract constitutes one for work or is a contract of sale, it is the dominant interest and object of the parties in entering into the contract, as evinced by the terms of the contract, the circumstances of the contract and the custom of the trade that provide a guiding indicator. The object of the parties is of necessity to be deduced from the terms of the contract. In order to elucidate the distinction which has been made, it would be necessary to turn to some of the authorities on the subject. While dealing with authorities it would be necessary to note that some of the decided cases deal with issues under sales tax legislation and many of those judgments relate to the period prior to the enactment of the Forty Sixth Amendment to the Constitution. The technicalities of sales tax legislation, especially as a consequence of the Forty Sixth amendment do not fall for determination in this proceeding. The decided cases are being referred to only with a view to emphasise the distinction between a contract for work and a contract for sale.

15. In Govt. of Andhra Pradesh v. Guntur Tobaccos Ltd., AIR 1965 SC 1396; 16 STC 240, the Supreme Court held that in the execution of a contract of work some materials may be used and property in the goods so used passes to the other party. However, the contractor who undertakes to do the work will not necessarily be deemed on that account to sell the materials. The Supreme Court noted that a contract for work in the execution of which goods are used may take one of three forms. Those three forms were elaborated as follows(page 1404 of AIR 1965 SC and page 255 of 16 STC):

> "The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price: it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work: or it may be a contract for work and use or supply of materials though not accessory to th execution of the contract is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances: if it is of the first: it is a composite contract for work and sale of goods: where it is of the second category, it is a contract for execution of work not involving sale of goods."

16. In a subsequent decision in the State of Punjab and Haryana v. Associated Hotels of India Ltd., AIR 1972 SC 1131; 29 STC 474, the Supreme Court held that a contract for sale is one whose main object is the transfer of property in, and the delivery of the possession of a chattel as a chattel to the buyer. Where the principal object of the work undertaken by the payee of the price is not the transfer of a chattel, the contract is one of work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of material, nor the value of the skill and labour as compared with the value of the material, is conclusive, though these circumstances may be taken into consideration in deciding whether a subsisting contract is a contract of work and labour or contract for a sale of a chattel. In Sentinel Rolling Shutters and Engineering Co.Pvt. Ltd. v. CST, AIR 1978 SC 1747; 42 STC 409 this principle was

reiterated by the Supreme Court. In State of Tamil Nadu v. Anandam Viswanathan, AIR 1989 SC 962; 73 STC 1, the contract in question involved supply and printing of question papers to universities. The assessee entered into those contracts for printing and the question involved was whether the taxable turnover for the purpose of the Tamil Nadu General Sales Tax Act, 1959 would include the printing and block making charges. The Supreme Court held that the contract in question was a contract of work, having regard to the nature of the job to be done and the confidence reposed in the contractor for work to be rendered. The supply of paper was merely incidental. More recently, in State of A.P.v. Kone Elevators (India) Ltd. [2005] 3 SCC 389; [2005] 140 STC 22, the assessee was under the terms of contract required to supply and install lifts to its customers, while it was the customers' obligation to undertake work connected in keeping the site ready for installation. The Supreme Court noted that under its contractual obligations, the assessee had undertaken the installation of lifts manufactured and brought to site in a knocked-down state and the contract in question was a contract of sale and not a works contract. The distinction between a contract of sale and a works contract found elaboration in the following observations(page 26 of 140 STC):

> "If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a 'contract of sale', the main object is the transfer of property and delivery of possession of the property, whereas the main object in a 'contract for work' is not the transfer of the property but it is one for work and labour. Another test often to be applied is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a 'sale'; if it is the latter, it is a 'works contract'. Therefore, in judging whether the contract is for 'sale' or for 'work and labour', the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provide a guide in deciding whether transaction is a 'sale' or a 'works contract'. Essentially, the question is of interpretation of the 'contract'. It is settled law that the substance and not the form of the contract is material in determining the nature of transaction."

17. In Hindustan Shipyard Ltd. v. State of Andhra Pradesh [2000] 119 STC 533, the Supreme Court enunciated certain principles which were deduced from the decided cases on the distinction between the two concepts. The second, third and fourth principles laid down in the judgment of the Supreme Court, read thus (page 545):

> "(2) Transfer of property of goods for a price is the linchpin of the definition of 'sale'.Whether a particular contract is one of sale of goods or for work and labour depends upon the main object of the parties found out from an overview of the terms of contract, the circumstances of the transaction and the custom of the trade. It is the substance of the contract document/s and not merely the form,

which has to be looked into. The court may form an opinion that the contract is one whose main object is transfer of property in a chattel as a chattel to the buyer, though some work may be required to be done under the contract as ancillary or incidental to the sale, then it is a sale. If the primary object of the contract is the carrying out of work by bestowal of labour and services and materials are incidentally used in execution of such work then the contract is one for work and labour.

(3) If the thing to be delivered has only individual existence before the delivery as the sole property of the party who is to deliver it, then it is a sale. If A may transfer property for a price in a thing in which B had no previous property then the contact is a contract for sale. On the other hand where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour.

(4) The bulk of material used in construction belongs to the manufacturer who sells the end-product for a price, then it is a strong pointer to a conclusion that the contract is in substance one for the sale of goods and not for the work and labour. However, the test is not decisive..."

18. A contract for sale has hence to be distinguished from a contract of work. Whether a particular agreement falls within one or the other category depends upon the object and intent of the parties, as evidenced by the terms of the contract, the circumstances in which it was entered into and the custom of the trade. The substance of the matter and not the form is what is of importance. If a contract involves the sale of movable property as movable property, it would constitute a contract for sale. On the other hand, if the contract primarily involves carrying on of work involving labour and service and the use of materials is incidental to the execution of the work, the contract would constitute a contract of work and labour. One of the circumstances which is of relevance is whether the article which has to be delivered has an identifiable existence prior to its delivery to the purchaser upon the payment of a price. If the article has an identifiable existence prior to its delivery to the purchaser, and when the title to the property vests with the purchaser only upon delivery, that is important indicator to suggest that the contract is a contract for sale and not a contract for work. In India, the distinction between the two categories is elucidated by the Sales of Goods Act, 1930. Sub-section(1) of section 4 provides that a contract of the sale of goods is a contract, whereby a seller transfers or agrees to transfer the property in goods to the buyer for a price. Where under a contract of sale, the property in goods in transferred from the seller to the buyer, the contract is that of sale, but where transfer of property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is not a sale but is an agreement to sell. A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of the offer. Under section 5(1) the contract may provide for immediate delivery of the goods or immediate payment of the price or postponement of delivery or payment of the price by installments."

In the case of State of Andhra Pradesh vs. M/s.Kone Elevators (India) Ltd. (supra),Apex Court observed as under:-

> "5. It can be treated as well settled that there is no standard formula by which one can distinguish a 'contract for sale' from a 'works-contract'. The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract'. In a 'contract of sale', the main object is the transfer of property and delivery of possession of the property, whereas the main object in a 'contract for work' is not the transfer of the property but it is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to the customer; is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a 'sale', if it is the latter, it is a 'works-contract'. Therefore, in judging whether the contract is for a 'sale' or for 'work and labour', the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a 'sale' or a 'works-contract'. Essentially, the question is of interpretation of the 'contract'. It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works-contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a "sale" or a "works-contract". Therefore, this question has to be ascertained on facts of each case, on proper construction of terms and conditions of the contract between the parties."

38. In the present case, as already held the assessee had undertaken the development of housing project at its own risk and cost. The land owner had accepted only the full price of the land and nothing further. The entire risk of investment and expenditure was that of the assessee. Resultantly, profit and loss also would accrue to the assessee alone. In that view of the matter, the addition of the Explanation to Section 80IB with retrospective effect of 1.4.2001 would have no material bearing in the cases on hand. We may recall that the said Explanation introduced by Finance (No.2)Act, 2009 provided 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)].

39. We may now move on to the question of ownership of the land.

40. Relevant portion of Section 2(47) reads as under:-

> "2(47): "transfer", in relation to a capital asset, includes,-
>
> (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882(4 of 1882); or

Section 53A of the Transfer of Property Act reads as under:-

> 53A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:
>
> **Provided** that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

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 under Section 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 under Section 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 under Section 80IB(10) of the Act.

44. In the case K. Raheja Development Corporation vs. State of Karnataka (supra), the Apex Court considered whether the builder, who was engaged in the development of property and for such purpose had entered into an agreement with the land owner, can be stated to have executed works contract. Such interpretation was rendered in the background of the term "works contract" defined in Section 2(1)(v-i) of the Karnataka Sales Tax Act, which reads as under:-

> "12. Section 2(1)(v-i) is relevant. It defines a "works contract" as follows:
>
> "2.(1)(v-i) 'works contract' includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;"
>
> It is thus to be seen that under the Karnataka Sales Tax Act the definition of the words "works contract" is very wide. It is not restricted to a "works contract" as commonly understood i.e. a contract to do some work on behalf of somebody else. It also includes
>
> "any agreement for carrying out either for cash or for deferred payment or for any other valuable consideration, the building and construction of any movable and immovable property". (emphasis supplied)
>
> The definition would therefore take within its ambit any type of agreement wherein construction of a building takes place either for cash or deferred payment, or valuable consideration. To be also noted that the definition does not lay down that the construction must be on behalf of an owner of the property or that the construction cannot be by the owner of the property. Thus even if an owner of property enters into an agreement to construct for cash, deferred payment or valuable consideration a building or flats on behalf of anybody else, it would be a works contract within the meaning of the term as used under the said Act."

It was in background of this definition provided by the statute that the Apex Court concluded that the agreement was one of works contract. The Apex Court observed that the term works contract contained in the Act is inclusive definition and includes not merely the works contract as normally understood but it is a wide definition which includes any agreement for carrying out building or construction activity for cash, deferred payment or other valuable consideration. Thus

the interpretation rendered by the Apex Court in the said decision was based on not the normal meaning of term "works contract" but on the special meaning assigned to it under the Act itself, which provided for a definition of the inclusive nature.

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 under Section 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.

46. We find that it is not even the case of the Revenue that other conditions of Section 80IB of the Act were not fulfilled. We, therefore, answer the question in favour of the assessee and against the Revenue and dispose of all appeals accordingly.

(Akil Kureshi, J.)

(Ms. Sonia Gokani, J.)