

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

**Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 1923/Ahd/2019
Assessment Year 2015-16**

The DCIT, Circle-4(1)(1), Ahmedabad (Appellant)	Vs	Sylvannus Builders and Developers Ltd. 4-5, Sigma-1, B/h Rajpath Club, Near Mann Party Plot, Bodakdev, Ahmedabad PAN: AAJCS9993G (Respondent)
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**Assessee Represented: Shri Aseem L Thakkar, A.R.
Revenue Represented: Shri N. J. Vyas, Sr.D.R.**

Date of hearing : 08-02-2023
Date of pronouncement : 08-05-2023

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Revenue as against the Appellate order dated 16.10.2019 passed by the Commissioner of Income Tax (Appeals)-8, Ahmedabad, arising out of the Assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2015-16.

2. The brief facts of the case is that the respondent assessee is a Private Limited Company engaged in the business of Real Estate Developers and Construction. For the Assessment Year 2016-17, the assessee filed its Return of Income on 28.09.2015 declaring a total income of Rs. 3,11,94,560/-. The case was selected for scrutiny and assessment was completed u/s. 143(3) wherein the Assessing Officer held that the assessee in principal accepted Percentage Completion Method (PCM) and returned profit of Rs. 3,11,94,560/- whereas the Assessing Officer estimated the profit at 9.31% under Profit Margin Method (PMM) as per earlier assessment Year 2015-16 and accordingly made an addition of Rs. 2,76,69,223/-. The assessing officer also made disallowance of interest u/s. 36(1)(iii) of the Act amounting to Rs. 1,06,64,058/- and thereby demanded tax thereon.

3. Aggrieved against the same, the assessee filed an appeal before Ld. Commissioner of Income Tax (Appeals) who deleted the additions as follows:

7.1 Assessment has been completed u/s. 143(3) of the Act and the appellant had furnished all information called for during the course of assessment proceedings. The assessee is a private limited company and it maintaining regular books of accounts which have been subject to statutory tax and company audit. The perusal of the audit report also does not reveal any qualificatory remark passed by the auditor with regard to the maintenance or reliability of accounts. The AO has not pointed out any defect or shortcoming in the books of accounts maintained. It is also an undisputed fact that the books of accounts have not been rejected as provided in section 145 of the Act. Therefore, AO has accepted the correctness of the books of accounts maintained. Where no shortcomings or other defects are pointed out in the books of accounts, the AO is precluded from estimating the profit particularly when no fault with the books of accounts has been demonstrated. The AO has not pointed out any single item of suppression of receipts, inflation of expenditure, valuation of inventories, principle followed for recognizing income etc. under these facts the AO cannot superimpose a profit percentage ignoring the books of accounts produced and maintained without bringing any material or evidence on record and rejecting the books of accounts. The AO has adopted the net profit percentage being the profit %age adopted by the assessee company while preparing budgeted forecasts of the income arising from the project prior to

its commencement. The budgets and forecasts by itself cannot be the reason for estimating profits unless it is demonstrated by credible evidences that the book profit declared by the appellant company is incorrect and which is evidenced by any defect or deficiencies in the books of accounts maintained. Appellant has summarized the total consideration in their submissions reproduced in the earlier part of this order, cost of project till March 2015, the percentage of completion and the revenue booked which matches the percentage of completion i.e. 46.64% The percentage of completion recognize has not been found to be lesser than the actual percentage of completion, no part of the expense is found to be excessively charged. Hence, there is no justification in applying the estimated percentage of profits once the revenue has been recognized on the basis of actual undisputed figures.

7.2 The Ld. AR has also referred to the various decisions including that of the jurisdictional High Court in support of his contention. The Ld. AR has relied upon the decision in the case of CIT v. Shakti Industries (2013) 217 taxman 77 (Gujarat) in support of the proposition that additions made without rejecting the books of accounts would not be justifiable. In the case of the appellant company, the AO has not rejected the books of accounts. Where the books of accounts have not been rejected would only imply that the books results are acceptable. Even for the purpose of estimating income therein has to be a reasonable nexus between the material available and circumstances of the case. The AO has not pointed out any material or other evidence on the basis of which an inference can be drawn that the books of accounts maintained by the appellant company are unreliable and the profits disclose therein are not acceptable and therefore, are required to be estimated. The Ld. AR has also relied upon the case of CIT v Symphony Comforts Systems Ltd. (2013) 216 taxman 225 (Gujarat) wherein the AO has merely observed a fall in GP rate as compared to the earlier years and accordingly made additions to the gross profit. However, no defect in the maintenance of the books of accounts was pointed out. Accordingly, it was held that there was no justification in rejecting the books of accounts and enhancement the GP rate.

In view of the above discussion, I do not find any merit in the action of the AO in determining the profits at Rs.5,88,63,783/- the same is restricted to Rs.3,11,94,560/- which is the returned profit offered by the appellant company, the addition made is deleted. AO is directed accordingly Ground NO 2 & 4 of the appeal are allowed.

3.1. Similarly, the Ld. CIT(A) deleted the interest expenditure made u/s. 36(1)(iii) as follows:

8.1 At the outset it has been contended by the appellant that the AO has taken into the alleged net interest of Rs.5,75,81,311/- (6,20,89,147-45,07,836) for the purpose of disallowance of interest. Appellant pointed out that the AO has ignored the interest that the appellant company has earned interest on bank deposits amounting to Rs. 1,35,14,960/-. Therefore, the total interest expenses (net) would be Rs.4.40.66,351/- (5,75,81,311- 1.35,14,960). This fact can be ascertained on perusal of note 17 of the audited accounts wherein interest on bank deposits of Rs. 1,35,14,960/- and has been reduced from the total expenses while determining the cost of sales and services. Therefore, the addition which has been made is on incorrect amount completely ignoring the interest income derived by the appellant which has not been taken into consideration by the AO while making such disallowances.

8.2 Without prejudice to the above, it is contended that during the year under consideration the long term borrowings of the appellant have decreased from Rs 44.71 crores to Rs 21.66 crores. This fact can be seen from the perusal of the Balance Sheet and Note 5 of the accounts. Therefore, in fact during the year under consideration, the liability on which interest is payable has decreased. Further attention is drawn to member's contributions as appearing in note 8 of the accounts. The same has increased from 122.66 crores to Rs.160.33 crores. Therefore, the appellant company has in fact received members advances which are interest free and there is a simultaneous reduction in the liabilities which are interest bearing. The work in progress as seen from note 13 of the accounts indicate that the same has reduced from Rs. 120.31 crores to 109.95 crores. This is on account of the fact that an amount of Rs.59.94 crores being the cost of goods sold has been transferred to the sales account. From the above discussion it would become clear that the appellant company had the following interest free funds available with it:

i. Share holders fund	Rs. 5,00,000/-
ii. Reserves & Surplus	Rs. 2,08,49,357/-
iii. Members booking money	Rs. 1 60,33,58,381/-
	Rs. 162,47,07,738/-

8.3 As against the same Rs 109,95,27,560/- there would be interest free surplus of Re.52,51,80,178/- (162,47,07,738-109,95,27,560). This is far in excess of the interest free advances of Rs.32,43,89,582/- on account of which interest has been disallowed. The above facts would clearly reveal that the appellant company had sufficient interest free funds to make these interest free advances. Appellant relied on various judgments and contended that it is a settled proposition of law that where the assessee has sufficient interest free funds in excess of the alleged interest free advances, no disallowance of interest u/s 36(1)(iii) can be made by attributing the same to interest free advances. Reliance is placed by the appellant on the following judicial pronouncements by the appellant.

8.3.1 Pr. CIT v Diamond Textile Mills (2018) 96 taxmann.com 234 (Guj.) wherein it has been held as under:

"Section 36(1)(ii) of the Income-tax Act, 1961 Interest on borrowed capital (Used for purpose of business) Assessment year 2012-13- In course of Assessment, Assessing Officer disallowed interest paid by assessee on various loans and advances - Tribunal found that assessee was already having a huge interest free funds available with it, moreover, amount of loans and advances were utilized for business purpose, more particularly in fixed assets and capital work in progress - Tribunal thus deleted disallowance made by Assessee Officer Whether, on facts, impugned order passed by Tribunal did not require any interference-Held, yes [Para 12] [In favour of assessee]"

8.3.2 Appellant further contended that in the case of the appellant company it is established beyond doubt that they had sufficient interest free funds which even after deployment towards business expenses was more than the alleged interest free advances and relied upon the judgment of Hon'ble jurisdictional High Court in the case of CIT v Raghuvir Synthetics Ltd. (2013) 354 ITR 222 (Guj.) wherein it has been held as under:

Section 36(1)(iii) of the Income-tax Act, 1961- Interest on borrowed capital (Interest free loan to sister concerns) - Assessment year 2001-02 Assessing

Officer disallowed interest on ground that assessee had given interest from lone to its sister concerns - Tribunal having found that huge funds were available without any interest liability with assess and that there was no evidence to hold that borrowed money was utilized for purpose of advance to sister concerns deleted disallowance - Whether on facts, Tribunal was justified in deleting disallowance of interest - Held, yes (Para 11) [In favour of assessee]

8.3.3. Appellant further relied on the judgment in the case of *CIT v Amod Stamping (P) Ltd.* (2014) 223 Taxman 256 (Guj.) wherein it has been held that

"3.2 Similar observations are made by the learned ITAT with respect to the assessment years 2005-06 and 2006-07 In the case of Reliance Utilities & Power Ltd (supra) the Bombay High Court has held the if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company, if the interest-free funds were sufficient to meet the investments and therefore, interest was deductible Similar view has been taken by the Division Bench of this Court in the case of Cry Gujarat State Fertilizers & Chemicals Ltd [2013] 358 ITR 323/36 foxmann.com 230/217 Taxman 229 (Guj). Applying the ratio/law laid down by the Bombay High Court in the case of Reliance Utilities & Power Ltd. (supra) as well as Division Bench of this Counsel in the case of Gujarat State Fertilizers & Chemicals Ltd. (supra) to the facts of the case on hand and when it has been found that the assessee was having interest-free funds far an excess of investments and therefore, it can be said that the investments are made out of interest-free funds and therefore, the AO was not justified in making additions and/or making disallowance under section 36(1)(iii) of the IT Act Under the circumstances, no error and/or illegality has been committed by the learned ITAT in deleting the disallowance made by the AO under section 35(1)(ii) of the IT Act. No question of law much less substantial question of law arise with respect to deletion of the disallowance made by the AO under section 36(1)(iii) of the IT Act."

8.4 The fact that appellant had surplus interest free funds of nearly Rs 32 crore and the total advances on which deemed interest u/s. 36(1)(ii) is computed are only Rs.32,43,89,582/-, these facts being uncontroverted the case is squarely covered by the ratio of the judgments of Hon'ble jurisdictional High Court in the case of *CIT Vs Amod Stamping (supra)* relied upon by the appellant. Respectfully following the same the disallowance by attributing deemed interest to interest free advance u/s. 36(1)(iii) amounting to Rs.1,06,64,058/- is not justified and is deleted. Ground No. 3 of the appeal is allowed.

4. Aggrieved against the same, the Revenue is in appeal before us raising the following Grounds of Appeal:

1. Whether the Ld. CIT(A) has erred in law and on facts in restricting the profits to Rs. 3,11,94,560/- as declared by the assessee in the return of income as against the income from the project under percentage completion method at Rs. 5,88,63,783/-?

2. Whether the Ld. CIT(A) has erred in law and on facts in deleting the disallowance of Rs. 1,06,64,058/- u/s 36(1)(ii) of the Income-tax Act, 1961?

4.1. The Ld. Sr. D.R. Shri N.J. Vyas appearing for the Revenue supported the order passed by the Assessing Officer and pleaded to uphold the same and thereby Revenue appeal is to be allowed.

5. Per contra, ld. A.R. Shri Aseem L. Thakkar appearing for the assessee submitted before us that the above issues are already considered by the Co-ordinate Bench of this Tribunal in assessee's own case for the Assessment Year 2014-15 in ITA No. 2469/Ahd/2018 dated 19.10.2022, wherein the revenue appeal was dismissed. Further the very same Assessing officer for the Assessment Year 2017-18 after getting direction u/s. 144A of the Act from Additional Commissioner of Income Tax, Range-4(1)(1) wherein it was held that after considering the facts and circumstances of the assessee case, Additional Commissioner advised the A.O. to accept the method of recognizing income, as has been offered by the assessee company, since there is no defect or shortcoming in the same, which is inconsonance with the Guidance Note issued by ICAI in respect of construction activity companies. Thus the Ld. Counsel submitted the additions made by the Assessing Officer does not survive taking in to account of the Tribunal decision in assessee's own case for the earlier Assessment Year 2014-15, as well as the A.O. accepted the Percentage Completion Method (PCM) offered by the assessee as correct method for the Assessment Year 2017-18, thereby requested to dismiss the ground filed by the Revenue.

6. We have given our thoughtful consideration and perused the materials available on record. The Ld. CIT(A) deleted the addition

on the ground that the A.O. without rejection of books of accounts u/s. 145 of the Act, but estimated the income based on Profit Margin Method. The Co-ordinate Bench of this Tribunal for earlier Assessment Year 2014-15 deleted the addition made by the AO observing as follows:

“...6. Before us, the Ld.DR was unable to point any infirmity in the findings of the Ld.CIT(A) that as per the guidance note issued by the ICAI for accounting of construction contracts the cost of land was to be excluded for calculating the Construction and Development cost of the project, nor was he able to controvert the factual findings of the Ld. CIT(A) that after excluding this cost of land the CDC completed by the assessee during the year was below the prescribed 25% of the Estimated cost of the project.

Since the basis of the AO for recognizing Revenue from construction contracts of the assessee during the impugned year was the CDC, as per his calculation exceeding the prescribed limit of 25% of the estimated cost of project, which the Ld.CIT(A) has found to be factually incorrect and the Revenue has been unable to controvert the factual finding of the Ld.CIT(A) before us, we see no reason to interfere in the order of the Ld.CIT(A) upholding the claim of the assessee that no revenue was to be recognized in the impugned year from the construction projects undertaken by it. Ground no.1 raised by the Revenue is accordingly dismissed.”

6.1. Respectfully following the above decision of the Co-ordinate Bench, the ground raised by the Revenue is devoid of merits and the same is liable to dismissed and thereby the addition made by the Assessing Officer is hereby deleted.

7. Regarding ground no. 2 disallowance of interest expenditure u/s. 36(1)(iii) of the Act, the Ld. CIT(A) has held that the assessee had surplus interest free funds surplus of nearly Rs.52,51,80,178/- and this is far excess of the interest free advances of Rs. 32,43,89,592/-. This is uncontroverted by the Revenue. Therefore the addition made u/s. 36(1)(iii) is not sustainable.

7.1. It is settled principle of law by various judgments of the Jurisdictional High Court that when the interest free funds

available with the assessee were far in excess of investments, it can be said that the investments are made out interest free funds, then the disallowance made u/s. 36(1)(iii) by the A.O. is not justifiable. Respectfully following the jurisdictional High court in the case of Amod Stamping Pvt. Ltd., the disallowance made by the A.O. is unjustifiable and the same is hereby deleted. Thus the grounds raised by the Revenue is devoid of merit and the same is dismissed.

8. In the result, the appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 08-05-2023

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 08/05/2023

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद