

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH

**Before: Ms. Suchitra Kamble, Judicial Member
And Shri Waseem Ahmed, Accountant Member**

**ITA No. 760/Ahd/2011
Assessment Year 2007-08**

The DCIT, Circle-11, Ahmedabad (Appellant)	Vs	Umang Hiralal Thakkar, Ahmedabad PAN:AAVPT8621R (Respondent)
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**ITA No. 796/Ahd/2011
Assessment Year 2007-08**

Umang Hiralal Thakkar, Ahmedabad PAN:AAVPT8621R (Appellant)	Vs	The DCIT, Circle-11, Ahmedabad (Respondent)
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**Assessee by: Shri S.N. Soparkar, Sr. A.R. &
Shri Parin Shah, A.R.**

Revenue by: Shri Ahilendra Pratap Yadaw, CIT-D.R.

Date of hearing : 31-01-2024

Date of pronouncement : 09-02-2024

आदेश/ORDER

PER BENCH:-

These two appeals filed are against the order dated 13-01-2021 passed by ld. CIT(A)-XVI for assessment year 2007-08.

2. The grounds of appeals are as under:-

ITA No. 760/Ahd/2011 A.Y. 2007-08 filed by Revenue

“(1) The Ld. CITA) erred in law and on facts in deleting the addition of Rs 13,80,13,924/- made by the AO, on account of unaccounted investment u/s. 69C of the I.T. Act without property appreciating the facts of the case and the materials brought on record by the AO.

(1.2) The Ld. CIT[A]-XVI, Ahmedabad has erred in law and on facts in accepting the contention of the assessee that the amount of unexplained income has already been offered for tax without appreciating that the assessee could not substantiate its claim had inflated the cost of WIP without incurring any expenses so as to claim higher deduction u/s. 80IB of the Act.

(2) On the facts and circumstances of the case, the Ld. CITA) ought to have upheld the order of the Assessing Officer.

(3) It is therefore prayed that the order of the Ld. CIT(A) may be set aside and that of the order of the Assessing Officer be restored to the above extent.”

ITA No. 796/Ahd/2011 A.Y. 2007-08 filed by Assessee

“1. The learned Commissioner of Income Tax(Appeals) has erred in confirming the action of the Assessing Officer in rejecting the books of accounts of the appellants u/s. 145 of the I.T. Act, 1961.

2. The Learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of deduction of Rs. 13,68,61,112/- claimed by the appellants u/s. 801B(10) of the I.T. Act, 1961 being an amounts for the deductions claimed of Rs.6,20,64,195/- in Swaminarayan Enterprise, Rs.3,89,76,532/- in Ghanshyam Enterprise and Rs.3,58,20,384/- in Neelkanth Enterprise as per Form No.10CCB certified by The Chartered Accountant.

- 3. The Learned Commissioner of Income Tax (Appeals) has erred in holding that there is non compliance of the provisions of section 80AC of the Act. He ought to have considered the fact that on account of the search the finalization of accounts of the earlier years were delayed on account of the late availability of the account books & other material by the Department. He ought to have considered that until the accounts of the earlier year(s) are not finalized the accounts of the year under appeal cannot be drawn and therefore the alleged non compliance of section 80AC was not intentional or willful.*
 - 4. The Learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance made u/s 801B(10) of the I.T. Act, 1961 on the ground that the appellant is not the developer on the ground that the plans have been approved in the name of owners of the land.*
 - 5. The Learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance u/s.801B(10) of the I.T. Act, 1961 on the ground that the certificate in Form 10CCB is not tenable & reliable as the auditor CA & the author CA of the Certificate are different revenue recognition policy mentioned by them are different.*
 - 6. The Learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance u/s. 801B(10) of the IT. Act, 1961 by holding the view that the Appellant & Auditors are not certain whether the profits are being declared on WIP or on sales & hence the books of accounts as well as Certificate both are not reliable.*
 - 7. The Learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the Assessing Officer in drawing a conclusion regarding alleged controversies in the method of accounting for revenue recognition and valuation of stock while disallowing the claim made u/s 801B(10) of the I.T. Act, 1961.*
 - 8. The learned Commissioner of Income Tax (Appeals) has erred in confirming the addition of Rs.12,99,159/- u/s.40(a)(ia) of the I.T. Act being an amount of expenses on which TDS has not been paid and disallowed by the appellant himself in A.Yr. 2006-07 which are now paid and claimed in the year under appeal.*
 - 9. The Appellant craves leave to add, alter, amend or modify any of the grounds of appeal on or before the date of hearing of appeal.”*
3. First we are taking up the Revenue's appeal. The assessee filed his return of income on 22-02-2008 declaring total income at Rs. 35,15,850/-. The return was duly processed u/s. 143(1) of the Income Tax Act, 1961.

The case of the assessee was selected by scrutiny and notice u/s. 143(2) was issued on 04-03-2008 and served upon accordingly. The other statutory notices u/s. 143(2) and 142(1) were issued on 14-10-2009 and served on the assessee on 15-10-2009. Vide letter dated 26-10-2009, the assessee in compliance to notices issued u/s. 142(1) of the Act submitted hard copy of return of income for assessment year 2007-08. Statement of total income for cost forming the part of the statement of income, audit report u/s. 44AB of the Act and filed audit account with annexures, appendixes and enclosures were filed. The Assessing Officer observed that as provided u/s. 139(1) of the Act, the assessee was required to file his return of income by 30-09-2007. The assessee has claimed deduction under chapter VIA of the Act specially under 80IB(10) amounting to Rs. 13,68,61,112/-. The Assessing Officer observed that the claim of deduction u/s. 80IB(10) of the Act has to further certain requirements which was specifically quoted from para 9 to 13 of the assessment order. The Assessing Officer further observed that in view of non-compliance of sub-section 80AC to his fulfillment of conditions led down in section 80IB(10), the submissions of Form No. 10CCB which is ab-initio on account of grounds that the assessee has filed the return of income beyond the time allowed u/s. 139(1) of the Act as well as the assessee is not a developer as contemplated u/s. 80IB(10) and therefore the deduction u/s. 80IB(10) of Rs. 13,68,61,112/-. The Assessing Officer also made disallowance of Rs. 13,80,13,924/- and made addition u/s. 69C of the Act. The Assessing Officer also made disallowance of Rs. 12,99,159/- u/s. 40(a)(ia) of the Act.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. In respect of Revenue's appeal, the Id. Departmental Representative submitted that Assessing Officer has rightly made disallowance u/s. 69C on the basis of details provided under audit report amounting to Rs. 13,80,13,924/-. The Id. Departmental Representative relied upon the assessment order. The Departmental Representative submitted that the assessee could not substitute its claim and the same is unexplained income as it had inflated the cost of work in progress without incurring any expenses so as to claim higher deduction u/s. 80IB of the Act.

6. The Id. Authorized Representative relied upon the decision of CIT(A) in respect of this issue and further submitted that the Assessing Officer has disallowed the said amount u/s. 80IB and again disallowed the same amount u/s. 69C which will amount to double taxation. The Id. Authorized Representative pointed out that the profit and loss account of the assessee in respect of all three parties and submitted that the opening work in progress and the expenses incurred during the year under consideration constitute cost of the project and the Assessing Officer has completely overlooked the fact that the it is this very amount that has been treated as income while filing return of income.

7. We have heard both the parties and perused all the relevant materials available on record. It is pertinent to note that the whole confusion is because that the assessee has taken the total booking amount (creditors) as

closing are in work in progress and the balancing figure was offered by the assessee as cost profit and the balancing figure was taken by the Assessing Officer as unexplained investment. Thus, the CIT(A) was right in deleting this addition thereby holding that the amount of unexplained income has already been offered for tax as gross profits of the respective projects and therefore the question of invoking section 69C is not warranted. There is no need to interfere with the finding of the CIT(A) on this issue. Hence, the appeal filed by the Revenue is dismissed.

8. As regards the assessee's appeal, the Id. Authorized Representative submitted that merely because return of income is not filed within the time limit prescribed u/s. 139(1) that by itself cannot be the reason for rejecting the claim of deduction u/s. 80IB(10) of the Act. The fact of the matter is that the return of income is filed u/s. 139 of the Act and is duly accompanied by the TAR and report for claim u/s. 80IB(10) of the Act. Though the word shall be used as u/s. 80IB(10) which denotes the condition has to be mandatorily followed in certain situations the term shall also includes hm. Provisions should not be so strictly constructed and the reason for not fling being bonafide and genuine should be considered. The Assessing Officer has completely mis-understood the contentions of the assessee. The search operations took place on 09-02-2005 during the course of search proceedings. The books of accounts and other documents and records were seized by the Department. After various applications, the details were made available only in the month of Nov, 2016. Thereafter, the books of accounts were completed, audit process was undertaken and the return of income for assessment year 1999-2000 to 2015-16 were filed. The assessments were

completed in December, 2006 and the assessee was visited with huge tax liability. The appeals were filed and the hearings were underway immediately. In the meantime on account of the huge demands, bank accounts were also attached. On account of such reasons, the finalization of the books of the accounts and audit thereof of the subsequent period was also delayed. The Id. A.R. submitted that the accounts for assessment year 2005-06 were audited on 06-05-2006 and return of income for aforesaid year was furnished on 31-10-2006. Similarly, the accounts for assessment year 2006-07 were audited on 25-09-2007 and return of income for the aforesaid year was furnished on 26-09-2007. Therefore, it only after 25-09-2007 giving books of accounts be finalized and the audit process be undertaken and the return of income filed. In fact, within a period of six months from the date of filing the return of assessment year 2006-07 for the return of income for assessment year 2007-08 was finalized. The Id. Authorized Representative submitted that this only was to establish the contentions made by the assessee that the assessee provided the records and other material seized during the course of search proceedings in the month of October, 2006 and thereafter the return of income for assessment year 2005-06, 2006-07 & 2007-08 were filed. The Id. Authorized Representative further submitted that during the course of audit verification, clarification, explanations and other evidences and materials have to be furnished to satisfy the statutory requirements. Once, the audit is completed then the return of income is prepared. With the return of income and relevant TDS certificates have to be attached. Attention is also invited to the fact that once the book keeping were solid for such long period i.e. 20 months, the process of cross verifying the accounts and the collating related details also

become a very cumbersome task. After the audit for assessment year 2005-06 is complete, the entire process as narrated for assessment year 2006-07 commences. It is subsequent to assessment year 2006-07 that the books of accounts, audit and return filing for assessment year 2007-08 is undertaken. This is because only after the opening balances are adopted the process of the complete books of accounts commences. The ld. Authorized Representative relied upon the following decisions:-

1. *Judgment of Hon'ble Gujarat High Court in case of Goodluck Automobiles Pvt. Ltd.*
2. *Judgment of Hon'ble Gujarat High Court in case of Pushpadhanwa Estate Owners Association*
3. *Order of Hon'ble Ahmedabad Tribunal in case of Rajhans Builders 41 SOT 331*
4. *Order of Hon'ble Ahmedabad Tribunal in case of Vallentine Cine Vision Ltd ITA #2497/Abd/2009*
5. *Order of Hon'ble Chennai Tribunal in case of Shri R Samiappan ITA#237/Mds/2009*
6. *Order of Hon'ble Vishakhapatnam Tribunal in case of Dr Gangina Suguna Rajahmundry ITA #173 & 174/Vizag/2011*
7. *Order of Hon'ble Chennai Tribunal in case of Sahul India Ltd IIA # 768 & 769/Kol/2011*
8. *HP Housing & Urban Development Authority (HIMUDA) 157 taxmann.com 598 Himachal Pradesh*
9. *Fiberfill Engineers 85 taxmann.com 27 Delhi*
10. *Chirakkal Service C- Operative Bank Ltd. 68 taxmann.com 295 Kerala*
11. *Shreeji Developers 37 taxmann.com 272 Gujarat*

9. The Id. Departmental Representative relied upon the assessment order and the order of CIT(A). The Id. Departmental Representative further submitted that since the assessee has filed the return within the stipulated time as prescribed u/s. 80AC, the CIT(A) as well as the Assessing Officer has rightly rejected the claim of the assessee. The Id. Departmental Representative relied upon the decision of Hon'ble Supreme Court in case of *Wipro Ltd. vs. Pr. CIT (2022) 142 taxmann.com 562 (SC)*.

10. We have heard both the parties and perused all the relevant materials available on record. It is pertinent to note that though the assessee was having a genuine reason for filing the return of income along with the audit report due to the attachment of bank accounts as well as the search operation the mandatory date u/s. 80AC prescribed for claiming deduction u/s. 80IB has to be applied as the decision of Hon'ble Apex Court in case of *Wipro Ltd. (supra)* has categorically held that for claiming the benefit u/s. 10B(8) of the Income Tax Act, the twin conditions of furnishing a declaration before the Assessing Officer and that too before due date of filing original return of income u/s. 139(1) are to be satisfied and both are to be complied with. In the present case, the assessee is claiming deduction u/s. 80IB(10) and the Income Tax Statute u/s. 80IB(10) is also uses the word "shall" and therefore the condition of filing the return of income within the due date is mandatory in nature. The Id. Authorized Representative relied upon the decision of Hon'ble Himachal Pradesh High Court in case of *H.P. Housing and Urban Development*. The decision of Hon'ble HP High Court also has observed that the return of income filed u/s. 139(4) cannot said to be meeting the requirements of section 139(1) in context of section 80AC of the Act which

specifically insisting the filing of return by the due date prescribed u/s. 139(1) for filing the admissible deductions which is set out in para 4(iv) of the said decision. Though the decision of Hon'ble Himachal Pradesh states that the assessee is entitled to claim specifically the computed deductions despite late filing of belated return of income, in the present case, the statutory date for filing the return of income was that of 30-09-2007 and the search operations took place on 19-02-2005 and the details were available in the month of Nov, 2006 as stated by the assessee before the CIT(A) as well as before us. The reasoning given by the assessee that within a period of six months from the date of filing of return of income for assessment year 2006-07, the assessee have filed return of income for assessment year 2007-08 will not help the assessee as the assessee was very well aware of mandatory date of filing the original return of income. The decision of Hon'ble Apex Court has not been considered in the context of the mandatory filing and the compliance of the due date as given u/s. 80AC including that of decision of Hon'ble Himachal Pradesh High Court as well as the order of the Tribunal passed in ITA 415/2020 order dated 16-06-2023. As regards, the decisions of Hon'ble Gujarat High Court in case of Goodluck Automobile Pvt. Ltd. & Pushpadhanwa Estate Owners Association, the said decisions were taken in the context of the facts emerging in those respective assessee's cases & in present assessee's case facts remains that return was filed belatedly that is beyond due date despite availability of record after the search & seizure in Nov, 2006. The plea of Assessee that within short time the assessee cannot file return will not come to rescue the assessee because the records were available with the assessee before the due date of filing return for A.Y. 2007-08. As regards decisions of various ITAT Benches including

Ahmedabad and various High Courts, the same are in the context of the factual aspects therein and therefore will not be applicable in present case. Thus, ground no. 3 of assessee's appeal is dismissed.

11. As regards ground no. 1, 2 and ground nos. 4 to 7 remains un-academic in light of the decision/observations made in respect of ground no. 3 of assessee's appeal hereinabove. Hence, ground no. 1, 2 and 4 to 7 are dismissed.

12. As regards ground no. 8 relating to addition of Rs. 12,99,159/- u/s. 40(a)(ia) of the Act being an amount of expenses on which TDS has not been paid and disallowed by the assessee himself in assessment year 2006-07 which are not paid and claimed in the present year, the ld. Authorized Representative submitted that it needs verification and same may be remanded back to the file of Assessing Officer. The ld. Departmental Representative relied upon the assessment order and the order of the CIT(A).

13. We have heard both the parties and perused all the relevant materials available on record. Though it appears that the Assessing Officer has disallowed the said amount for assessment year 2006-07 and whether the same is now paid and claimed in the present year and how that has to be quantified needs verification. Therefore, we direct the Assessing Officer to verify the same and if entitled grant the credit of the same as per income tax statute to the assessee. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. This ground no. 8 is partly allowed for statistical purposes.

14. Thus, appeal filed by the assessee is partly allowed for statistical purposes.

15. In the result, appeal filed by the revenue is dismissed and appeal filed by assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 09-02-2024

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad : Dated 09/02/2024

Sd/-

(SUCHITRA KAMBLE)
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