

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'डी' अहमदाबाद
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 968/Ahd/2013

निर्धारण वर्ष/ Assessment Year : 2009-10

M/s. Sugam Construction Private Limited, 4 th Floor, Arun Complex, Opp. C.U. Shah Collage, Ashram Road, Ahmedabad-09 PAN : AACCS 6759 H	Vs	ACIT (OSD), Circle - 8, Ahmedabad
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आयकर अपील सं./ ITA No. 1612/Ahd/2013

निर्धारण वर्ष/ Assessment Year : 2009-10

ACIT (OSD), Circle - 8, Ahmedabad	Vs	M/s. Sugam Construction Private Limited, PAN : AACCS 6759 H
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri P.M. Mehta, AR
Revenue by :	Shri R. P. Maurya, Sr. DR

सुनवाई की तारीख/Date of Hearing : 11/09/2017

घोषणा की तारीख /Date of Pronouncement: 18/09/2017

आदेश/O R D E R

PER MAHAVIR PRASAD, JUDICIAL MEMBER:-

These cross appeals by the assessee and Revenue are directed against the order of the Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad dated 26.03.2013 for Assessment Year 2009-10.

2. The assessee has taken following grounds in its appeal vide ITA No.968/Ahd/2013:-

1. *The order passed by the learned AO is against the law, equity and justice.*
2. *The ld. CIT(A) has erred in law and facts in upholding the disallowance made by the ld. AO of interest expenses considering as excessive payment to the persons specified u/s 40A(2)(b) of the Act of Rs.15,65,236/-.*

3. *The learned CIT(A) has erred in law and on facts in upholding the disallowance made by the ld. AO of car hire charges of Rs.1,02,000/- u/s 40a(ia) of the Act.*

3. The Revenue has raised following grounds in its appeal vide ITA No. 1612/Ahd/2013:-

1. *(a) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts to hold that Assessee was 'develop & builder' eligible to claim deduction u/s.80IA(4) of the Act.*

(b) The Ld. Commissioner of income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts to ignore that assessee was essentially engaged in only execution of 'projects' envisaged by various central & state government agencies/ Department and hence, squarely in the nature 'works contract', as laid down in explanation to provision of section 80IA(4) inserted vide Finance Act 2009 w.e.f. 01.04.2000.

(c) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts to ignore that Assessee was raising RA bills on various central/state government agencies/ Department in respect of contracts under consideration which clearly established that Assessee was merely 'executor' and not developer of the projects.

2. *The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts to allow deduction u/s. 80G of the Act @Rs.2,50,000/- as against Rs.1,46,458/- computed by Assessee itself during assessment proceedings.*
3. *On the facts and in the circumstances of the case, the Ld. Commissioner of income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.*
4. *It is therefore, prayed that the order of the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad may be set-a-side and that of the order of the Assessing Officer be restored.*

4. The brief facts of the case are that assessee is a private limited company engaged in the business of construction & development of under-bridges, canals etc. For the year under consideration, the assessee filed return of income declaring total income of Rs.21,45,917/- after claiming deduction of Rs.52,45,490/- u/s 80-IA of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). The case of the assessee was picked

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up for scrutiny assessment and the assessment u/s. 143(3) of the Act was framed vide order dated 05.12.2011. While framing the assessment, the Assessing Officer assessed the total income of the assessee at Rs.98,61,410/- by making various additions/disallowances as under:-

Total income as per return of income	-	Rs.2145917/-
1. Disallowance u/s 43B	-	Rs. 245237/-
2. Disallowance of interest u/s 40A(2)(b) of the Act	-	Rs.1565236/-
3. Disallowance of Donation	-	Rs. 538001/-
4. Disallowance of interest on TDS, FBT, Service tax etc.	-	Rs. 19529/-
5. Disallowance of car hire charges u/s 40a(ia) of the Act	-	Rs. 102000/-
6. Disallowance of claim for deduction u/s 80IA	-	<u>Rs.5245490/-</u> Rs.9861410/-

5. Aggrieved by the order of the Id. Assessing Officer, assessee went in appeal before the Id. CIT(A), who has given partial relief to the assessee; however, confirmed the additions made by the Assessing Officer u/s 40A(2)(b) of the Act of Rs.15,65,236/- and disallowance of car hire charges of Rs.1,02,000/- u/s 40(a)(ia) of the Act and deleted the rest of the additions / disallowances made by the Id. Assessing Officer.

6. Aggrieved, both the assessee and the Revenue are in appeal before us. Assessee being aggrieved by the order of the Id. CIT(A) in confirming the additions made by the Id. Assessing Officer while the Revenue is aggrieved by the order of the Id. CIT(A) in deleting the additions made by the Id. Assessing Officer.

7. First ground raised by the assessee is against the order of the Id. CIT(A) in upholding the disallowance made by the Id. Assessing Officer u/s 40A(2)(b) of the Act of Rs.15,65,236/-.

7.1 The brief facts of the case in this regard are that during the appellate proceedings, the assessee has submitted that the assessee-company had entered into agreements for development of infrastructure with various government bodies such as AUDA, AMC, Indian Railways etc... Assessee-company was awarded various contracts for construction of under bridges. All such contracts are required to be completed within the time limit stipulated and in case of delay or default to complete work in stipulated time limit, there are terms in the contracts for levy of penalty for delay in execution of work. It was costly affairs to assessee-company to pay for default for execution of works for which it had to incur penalty, which ultimately put assessee-company in blacklist by the various Govt. Department, which, resulted into make the situation difficult to the appellant to get any new contracts. The assessee-company had cash credit facilities of Rs. 50. 00 lacs and bank guarantee facilities of Rs. 225.00 lacs were frozen by the bankers of the appellant company i. e. State Bank of India w.e.f. 12-04-2008. Therefore, the assessee-company put into heavy financial crisis. Due to sudden freeze of credit facility, the assessee-company put into actuate financial crisis. As numbers of litigations were going on against the appellant company, no one was ready in the market to provide the finance to the company considering uncertainty of repayment of loans. Since it was difficult to run the business in absence of requisite finance, the assessee-company has offered higher rate of interest. Some of the share holders having minority interest in the company had agreed to provide loan to the assessee-company after taking high risk of bad debts. For taking such huge risk, shareholders have charged some higher interest. There were disputes amongst the management of the company and various parties have issued notices for winding up of the company. Under these circumstances, assessee-company has borrowed the money at the higher rate of interest.

7.2 Assessee-company has paid interest to companies which were in the tax slabs of 30.90%, while company had not liable to tax, but have to pay MAT liability @18.54% which ultimately adjusted against tax liabilities of subsequent years. So, there are no other benefits to assessee to make payment at higher rate of interest to lenders to avoid or reduce any tax liability. Considering the financial situation, various litigations against the assessee-company and to complete the ongoing projects in time to avoid heavy penalty and risk of black listed as defaulter in various department of government, which would not able to get any contract in future, government circumstances of the assessee-company there was no other option but to borrow the money at higher rate. The assessee has made interest payment to various persons, the tax liabilities of those are as under:-

Sr. No.	Name of depositors	Tax
(1)	Nikolian Security and Finance Private limited	30.90%
(2)	Titan Technologies Pvt. Limited	30.90%
(3)	Nicolian Inc.	30.90%
(4)	Bhailalbai B. Patel	20.00%

Whilst assessee-company was taxed @ 18.54% under the MAT which is available for set off in succeeding years. It was not the case of the revenue that there is any colorful devices to avoid the tax or reduce the tax burden. The Ld. A.O. has also not alleged that expenditure is not incurred for the purpose of business. Assessee has submitted detailed reply dated 19.08.2011 to the Ld. A.O. explaining the justification of payment of interest with complete chart of interest account of the related parties. Ld. Counsel for the assessee also draw our attention that the ld. AO has erred in considering the company as relative u/s 40A(2)(b) of the Act.

Sec. 40(A)(2) read as under:

(1) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head "Profits and gains of business or profession".

(2) (a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction.

(b) The persons referred to in clause (a) are the following, namely : –

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|------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>(i) where the assessee is an individual</i> | <i>any relative of the assessee</i> |
| <i>(ii) where the assessee is a company, firm, association of persons or Hindu un-divided family</i> | <i>any director of the company, partner of the firm, or member of the association or family, or any relative of such director partner or member;</i> |

7.3 Ld. Counsel for the assessee also submitted that from the reading of above referred section, it is crystal clear that in the case of company, payment to director of the company or any relative of director would cover and in the case of assessee-company, the payment was made to the companies which had no substantial interest in the company and thereby, there was no loss on the part of the Revenue as all the aforesaid assesseees paid tax on interest receipt @ 30.90%. Ld. Counsel for the assessee also submitted that it is well settled principle that the tax authorities has not to see transactions from their point of view, but that of a prudent business man. So, the assessee-company has paid interest considering the uncertainty of repayment of interest and principal amount, unavailability of bank finance etc...

7.4 We have gone through the record and impugned order. When Id AR was asked that company ought to have taken loan from the Bank at lower rate of interest then why company has paid this much of high interest to the person specified u/s.40A(2)(b) of the Act. In reply learned AR stated that no bank has given them loan when bench specifically asked whether he has any documentary prove in support of his contention such as refusal letter from the bank for grant of loan. He stated that he does not have any such document. Therefore, in the absence of any concrete proof we do not find any force in the arguments of the Id. AR. So in these circumstances, this Ground of appeal of the assessee is dismissed

8. So far as second ground of assessee's appeal relating to disallowance of car hire charges of Rs.1,02,000/- u/s 40(a)(ia) of the Act is concerned, the assessee has been failed to submit any documentary evidence to substantiate its claim either before the lower authorities or even before us. Therefore, we are not inclined to interfere with the order passed by the Id. CIT(A) in this behalf regarding the disallowance of car-hire charges amounting to Rs.1,02,000/- u/s 40(a)(ia) of the Act. Accordingly the second ground of assessee's appeal is therefore dismissed.

9. In the result, assessee's appeal is dismissed.

10. Now, we come to Revenue's appeal. The substantive grievance of Revenue's appeal in Ground No.1 is against of the order of Id. CIT(A) in holding that the assessee was a "developer and builder" eligible to claim deduction u/s 80IA(4) of the Act.

10.1 At the time of hearing, Id. Counsel for the assessee contended that the issue in question is squarely covered by the decision of Co-ordinate Bench of this Tribunal in assessee's own case for AYs 2001-02, 2005-06 to 2008-09, order dated 21.12.2012, wherein the ITAT has held as under:-

"On the basis of this examination we, therefore, give a finding that it was wrong on the part of the AO to hold that the assessee has merely acted as a contractor. By analyzing the nature of work executed by the assessee, it can be gathered that the assessee had acted as a developer. The assessee has undertaken the responsibility of execution of the work. The assessee has developed its own design and on getting approval applied the technology for completion of infrastructure facility. Terms and conditions of the agreement executed with certain Government Departments have also established that the risk in execution of work has also been undertaken by the assessee. Rather, the assessee was held responsible for any damage or loss to the property. We have also noted that the Revenue Department has wrongly interpreted the word "owned" in section 80IA(4)(i)(a) of the IT Act. As discussed hereinabove, we hereby conclude that an enterprise which is either developing or operating or maintaining the infrastructure facility is required to be owned by a company or a consortium of companies duly registered in India. The act do not prescribe that the infrastructure facility is to be owned by such an enterprise. The infrastructure facility is always the property of the Government and an enterprise is bound by the agreement to transfer the same after the settled period. The assessee's execution of work fall within first category, i.e. developing of infrastructure facility. It was incorrect on the part of the AO to hold that the assessee being fallen within the first category not entitled for the deduction. The decisions of ABG Heavy Industries(supra), Koya & Company (supra), and Radhe Developers (supra) and Bharat Udyog Ltd. 118 ITD 336(Mum.) thus support the stand taken by the assessee. The assessee has executed the construction of infrastructure facility in respect of the Government Projects, as is evident from the list of the agreements placed on record, hence it was a factual error on the part of the AO to say that the assessee had entered in some contract with few private parties. We therefore hold that the assessee is eligible for the deduction u/s.80IA as claimed of Rs.4,79,508/-. The ground raised in this regard for the year under consideration is hereby allowed.

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21. Having heard the submissions of both the sides, we are of the considered view that the nature of work executed by the assessee, as listed at Sl.Nos.1 to 10 and 12, has already been discussed supra at length while deciding the appeal for A.Y.2005-06. We have examined the contract agreement executed between the Assessee and the Government Agencies. We have also examined that the assessee has applied the technology for which he was awarded the contract. Although the bills of the work executed were raised by the assessee, but there was an element of risk due to the reason that the assessee was made responsible for any damages or loss in execution of the work. After considering the nature of the work and other allied factors, we have taken a conscientious view in respect of those projects that the assessee is entitled for

the deduction u/s.80IA(4) of the Act. In the like manner, for the year under consideration as well, we hereby hold that the assessee is entitled for these projects for the claim of deduction u/s.80IA."

10.2 We, therefore, respectfully following the judgment of Co-ordinate Bench of this Tribunal in assessee's own case (supra), are not inclined to interfere with the order of the Id. CIT(A) in this regard; therefore, the this ground of the Revenue is accordingly dismissed.

11. The other substantive ground of the Revenue is against the order of Id. CIT(A) in granting the deduction claimed by the assessee u/s 80G of the Act of Rs.2,50,000/-.

11.2 Ld. Counsel for the assessee contended that during the course of scrutiny proceedings the assessee was asked to furnish working and explanation regarding the computation of income and the details as called for were furnished by the assessee alongwith tax audit report, wherein the auditors has qualified certain items which were to be added back to the total income. However, assessee vide letter dated 19.08.2011 admitted its mistake and filed a revised computation of income after adding back the amount of Rs.5,38,001/- to the total income. However, in the course of appellate proceedings before Id. CIT(A), it was submitted that the assessee-company has made donation of Rs.5,00,000/- to Umiya Mata Kadva Patidar Education and Samaj Seva Trust, which was registered u/s 12AA of the Act and was also approved u/s 80G(5) of the Act. The assessee-company accordingly claimed deduction u/s 80G in the original computation of income and also in the revised computation of income. However, Id. Assessing Officer disallowed this claim of the assessee.

11.2 On appeal before the Id. CIT(A), Id. CIT(A) allowed the claim of the assessee u/s 80G(5) of the Act as the assessee was produced before him the relevant copies of donation receipt and letter of approval dated 09.11.2006 for the period from 01.04.2006 to 31.03.2009 issued by the CIT, Gandhinagar

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and the same is also placed on record. Since the assessee has produced the relevant details for granting deduction u/s 80G of the Act, the Id. CIT(A) has rightly directed the Assessing Officer to allow the claim of deduction u/s 80G of the Act as claimed by the assessee of Rs.2,50,000/-. We do not see any infirmity in the order of the Id. CIT(A) on this issue and accordingly dismiss this ground of appeal of the Revenue.

12. In the result, appeal filed by the Revenue is dismissed.

13. In the combined result, the appeal filed by the assessee and the Revenue both are dismissed.

Order pronounced in the Court on 18th Sep, 2017 at Ahmedabad.

Sd/-
AMARJIT SINGH
(ACCOUNTANT MEMBER)

Ahmedabad; Dated 18/09/2017

**DR

आदेश की प्रतिलिपि बंधित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

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अहमदाबाद / BY ORDER,

उप/सहायक संजीकार (Dy./ Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad