

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6886/Del/2014
(Assessment Year: 2010-11)

ITO, Ward-23(3), New Delhi	Vs.	Siddharth Buildwell Pvt. Ltd, C/o. M/s. Virendra Kalra, & Co., 75/7, Rajpur Road, Dehradun PAN: AAJCS1167Q
(Appellant)		(Respondent)

ITA No. 253/Del/2015
(Assessment Year: 2010-11)

Siddharth Buildwell Pvt. Ltd, C/o. M/s. Virendra Kalra, & Co., 75/7, Rajpur Road, Dehradun PAN: AAJCS1167Q	Vs.	ITO, Ward-23(3), New Delhi
(Appellant)		(Respondent)

Revenue by :	Shri K. Tewari, Sr. DR
Assessee by:	Shri Ashwani Taneja, Adv
Date of Hearing	26/09/2018
Date of pronouncement	23/10/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed against the order of the Id commissioner of Income Tax (A)-XI, New Delhi dated 16.10.2014 for Assessment Year 2010-11. The assessee has raised the following four grounds of appeal in its appeal:

"1. *The Id Commissioner of Income Tax, Appeals XI, New Delhi (hereinafter referred as 'CIT(A) erred in upholding the order of the AO by disallowing the claim under section 80IB (10) of the Income Tax Act, 1961 of Rs. 3591412/- on account of non-submission of audit report in Form No. 10CCB, though it was produced at the first appellate stage.*

2. *The Id CIT(A) erred in partly upholding the order of the AO by adding back cash deposits made in ban of Rs. 687000/- though the same was made from out of the available cash in hand, which was also duly reflected in the books of accounts.*
3. *The Id CIT(A) erred in partly upholding the order of the Id AO by adding back gross profit of Rs. 9449668/-. The gross profit has been considered at Rs. 14591840/- (i.e. @9% of the revenue of Rs. 162131563/- recognized in PL during the year), which is much higher than the cumulative GP of Rs. 16908532/- offered @8.30% of the cumulative revenue of Rs. 203667683/- recognized in the profit and loss account considering a cumulative project completion rate of 82.17% till AY 2010-2011.*
4. *The Id CIT(A) erred in partly upholding the order of the AO by adding back the credit balance of two creditors, namely M/s. Oberoi Hill Transport Co. and Eashita Advertisers totaling to Rs. 227182/-*

2. Ld AO has raised following two grounds in his appeal.

- “1. *On the facts and circumstances of the case the Id CIT(A) has erred in law and on facts in restricting the disallowance of Rs. 9449668/- as against Rs. 15698940/- made by the Assessing Officer out of the expenses claimed.*
2. *The Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 359400/- being unexplained credit balance in the name of M/s. Kwalita Hardware after admitting additional evidence in violation of Rule 46A of the Income Tax Rules, 1962.”*

3. The brief facts of the case are that the assessee is a domestic company engaged in the business of real estate. It filed its return of income of income on 15.10.2010 declaring Nil income after claiming deduction u/s 80IB of the Act of Rs. 3591412/-. The Id AO examined the return of income of the assessee and noted that during the year receipt from sale of flats is Rs. 16.21 crores against Rs. 3.89 crores and expenditure of Rs. 15.70 crores against Rs. 2.75 crores compared in earlier years. Therefore, the Id AO proceeded to verify the claim of deduction u/s 80IB(10) of the Act. The assessee was asked to substantiate the book results by providing all books of accounts and supporting vouchers and bills. The partial details were submitted before the Id AO and based on this the Id AO issued notice u/s 133(6) of the Act to some sundry creditors. The assessee was once again directed to produce the books of account, however, the assessee did not produce the same before AO. For the purpose of verification of deduction u/s 80IB of the Act, the

assessee was asked to submit audit report in form No. 10CCB. The assessee did not submit such report. Therefore, the Id AO disallowed the claim of deduction u/s 80IB(10) of Rs. 3592412/-. The main reason is that the assessee could not show that the project of the assessee is on the plot size of minimum area of 1 acre. He further held that area of the flat is 1775 sq ft but what is common area and what is built up area was not known. Further, the area for commercial establishment was also not available. The assessee has also deposited cash in its bank account for which no proper explanation was given, hence, addition of Rs. 687000/- was made. On verification of the profit and loss account the Id AO noted that the expenses shown are 97% of the sale whereas in earlier year it was merely 70.43% of the sale therefore, he disallowed 10% of the total expenditure of Rs. 15.70 crores amounting to Rs. 15698940/-. However, based on the enquiry of the parties u/s 133(6) in case of 3 parties the correct address were not provided by the assessee and therefore, credit balance appearing in their name of Rs. 638158/- was added. Consequently, the assessment u/s 143(3) of the Act was passed on 21.03.2013 determining total income of Rs. Nil.

4. The assessee preferred appeal before the Id CIT (A). Before the Id CIT(A) the assessee filed an application for additional evidence in the form of audit report in form no 10 CCB. it was sent to the Id AO for his comment. The Id AO submitted its remand report dated 22.09.2014 requesting the Id CIT (A) to reject the application for additional evidence. The Id CIT(A) obtained the rejoinder from the assessee and thereafter vide para 7 of his order, he refused to admit additional evidences holding that the assessee was given sufficient opportunity for production of requisite details but the assessee has failed to submit those details along with books of account and no sufficient cause was shown. Therefore, he proceeded to decide the issue based on information available before the Id AO. During the course of appellate proceedings in para 7.2, he also noted that on 7 occasions hearing of the appeal was fixed but none appeared before him. Subsequently, the assessee submitted certain details on change of authorized representative . With

respect to disallowance of deduction u/s 80IB, he upheld the disallowance as the assessee failed to submit the audit report and books of account. With respect to the addition of Rs. 687000/- on account of cash deposit in the bank account, he confirmed the addition as the assessee did not produce the books of account. Therefore, according to him the source of cash deposit was not shown. With respect to the disallowance of 10% of the total expenditure, he noted that there is a huge discrepancies in the method of accounting adopted by the assessee further assessee itself has accepted that there is a error in books of account which is on account of error of accountant. As the assessee failed to produce the books of account along with respective bills, he adopted the gross profit ratio @9% and restricted the disallowance of expenses of Rs. 1.57 crores to Rs. 94.49 lakhs. He restricted the addition of Rs. 631582/- on account of sundry creditors to the extent of Rs. 227182/-. Accordingly, he partly allowed the appeal of the assessee with which the assessee and the revenue both are aggrieved.

5. Coming to the appeal of the assessee with respect to the first ground of appeal regarding disallowance of the deduction u/s 80IB(10) of the Act of Rs. 3591412/- on account of non submission of audit report in From No. 10CCB, The Id AR submitted that the assessee has submitted the same before the Id CIT(A) as an additional evidence but same was not admitted. He submitted that if the audit report is submitted during the course of first appellate proceedings same should have been accepted and admitted by the Id CIT(A). He further stated that the decision of Hon'ble Delhi High Court referred to by the Id CIT(A) in 317 ITR 299 is in fact supports the argument of the assessee. He submits that first appellate proceedings are extension of assessment proceedings only. He therefore submitted that same should have been considered by the Id CIT(A). On direction of the bench , he submitted a letter dated 27.09.2018 alongwith the audit report in form NO. 10CCB dated 31.08.2010.
6. The Id DR vehemently submitted that despite repeated requests of the Id AO to produce the books of account as well as the audit report the

assessee has not submitted the same. He further submitted that the list of allottees is very important details for claiming deduction u/s 80IB(10) of the Act which the assessee has not filed before any of the lower authorities. He further referred to Rule 46A of the Income Tax Rules, 1962 and submitted that the assessee has not shown sufficient cause for not submitting these details before Id AO and therefore, the conditions of Rule 46A are not met and hence, no fault can be found in the order of the Id CIT(A) in not admitting additional evidence.

7. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly the assessee has claimed deduction u/s 80IB(10) of the Act in the return of income. However, the requirement of submitting the audit report in Form NO. 10CCB(10) of the Act was not complied with by the assessee before the Id AO. The assessee has not produced the books of account to support the claim of deduction. For these reasons the deduction was denied to the assessee. Before the Id CIT (A) the assessee submitted additional evidence in the form of audit report which was not admitted by the Id CIT(A) as no sufficient cause was shown for not producing the same before the Id AO. The Id CIT (A) has relied upon the decision of the Hon'ble Delhi High Court in 317 ITR 249. We have carefully considered that decision, wherein, it has been held that filing of the audit report with the return of income is directory and it can be filed before the assessment. Even the first appellate stage is part of the process of making an assessment only. The Hon'ble Karnataka High Court in 317 ITR 207 has held that even if audit report is filed before the first appellate authority it is sufficient compliance with the provision of audit for claiming these deductions. The similar view is also been taken by Hon'ble Kolkata High Court in 238 ITR 257 and Hon'ble Punjab and Haryana High Court in 228 ITR 292. Further, the Hon'ble Madhya Pradesh High Court in CIT Vs. Medicaps Ltd 323 ITR 554 has held that the audit report can even be filed at the appellate stage. In the interest of justice, the Id CIT(A) should have considered the audit report filed in Form NO. 10CCB before him prior to deciding the issue of allowability of deduction u/s 80IB(10) of the Act. The assessee

has also filed copy of the report dated 31.08.2010 before us. The assessee has also stated that the list of allottees were also filed before lower authorities. According to the audit report, the assessee is engaged in business of developing and building housing projects vide approval dated 27.04.2006. The total area of the plot of the project is stated to be 11493.24 sq meter and built up area of the residential unit of the project is certified to be 14514.52 sq mtr. Total sales of the industrial undertaking is certified at Rs. 162131562.51 and the profits and gains of the eligible unit is certified at Rs. 3591412/-. The chartered accountant has also stated that the undertaking satisfies the conditions stipulated u/s 80IB of the Act. Before the Id Assessing Officer the above certificate was not available and assessee also did not produce the books of accounts therefore, the disallowance was made. The assessee has also shown that the details could not be produced as the earlier tax consultant / chartered accountant did not represent the case of the assessee properly. He has also shown that even before the Id CIT (A) these facts are recorded in para NO. 7.2 of his order. According to us looking at the facts of the case there is a sufficient cause with the assessee in not producing the certificate/ audit report as well as the books of accounts before the Id AO. Looking to the facts and circumstances of the case we find that the Id CIT(A) has erred in not admitting the additional evidence in the form of audit report in Form NO. 10CCB. In view of this and in the interest of justice we set aside the issue of allowability of deduction u/s 80IB of the Act back to the file of the Id AO with a direction to the assessee to produce the audit report and demonstrate that all the conditions for allowability of the claim are satisfied and produce books of accounts along with vouchers and bills before the Id AO. The Id AO is also directed to examine the same and if found in accordance with the law allow the claim of the assessee after verification. In the result, ground NO. 1 of the appeal of the assessee is allowed accordingly.

8. Ground No. 2 of the appeal is with respect to cash deposit of Rs. 6.87 lacks deposited in the bank account of the assessee. The claim of the assessee is that it is deposited out of the cash available in the regular

books of accounts. However, assessee did not produce the regular books of accounts to substantiate its claim before the lower authorities. As we have already set aside ground No. 1 of the appeal to the file of the Id AO with a direction to assessee to produce the books of accounts before the Id AO we are of the view that accordingly, this ground of appeal should also go back to the file of the Id Assessing Officer as the details are to be shown to the Assessing Officer from the books. Accordingly, ground No. 2 of the appeal is also set aside back to the file of the Id AO with a direction to the assessee to show the source of cash deposited in the bank account from the regular books of account. Id AO is also directed to verify the same and decide the issue accordingly. Ground No. 2 of the appeal of the assessee is allowed with above direction.

9. Ground No. 3 is with respect to the determination of the gross profit by the Id CIT(A) @9% of the gross receipt and confirming the addition of Rs. 9449668/-. The above addition is also made by the Id AO for the reason that the assessee has failed to produce the books of account before the Id Assessing Officer and the cost of flats sold is higher disproportionately in percentage to the sales compared to previous year. The Id CIT(A) restricted the addition estimating the gross profit of the assessee @9% taking the base of assessee's own admission of the gross profit @8.75% according to the percentage completion method. The Id CIT(A) has stated that the profit shown by the assessee are not commensurating with the method of accounting adopted by the assessee. As the assessee has not produced the books of account before the Id Assessing Officer and now vide ground No. 1 we have already directed the assessee to produce the books of account along with vouchers and bills there is no point in not setting aside this ground of appeal back to the file of the Id AO. Even otherwise, if there is any addition made on account of the business of assessee which is eligible for deduction u/s 80IB of the Act it will go to swell the profits of the industrial undertaking itself. Hence, it also makes imperative to first decide the issue of allowability of claim of deduction u/s 80 IB first. Therefore, in the interest of justice we set aside ground No. 3 back to the file of the Id Assessing Officer with a direction to the

assessee to produce the books of account along with all necessary vouchers and bills and to justify the book results in accordance with the percentage completion method adopted by the assessee. The Id Assessing Officer is also directed to verify the claim of the assessee along with the books of accounts and then decide the issue afresh. As the Id CIT(A) has sustained the addition on the basis of gross profit the Id Assessing Officer is also directed to verify the books of accounts and if no defect is found therein, then to accept the book results after proper verification. Accordingly, ground No. 3 of the appeal is allowed.

10. Similar is the ground No. 1 of the appeal of the revenue where the Id AO is aggrieved by the order of the Id CIT(A) wherein, he has restricted the addition of Rs. 15698940/- to Rs. 9449668/-. As we have already set aside the ground No. 3 of the appeal of the assessee which is connected with this ground, we also set aside ground No. 1 of the appeal of the Id AO to file of the Id AO with similar direction to the assessee. In the result ground NO. 1 of the appeal of the revenue is allowed with above direction.
11. Ground No. 4 of the appeal is with respect to sustaining the addition of Rs. 227182/- with respect to the credit balance to creditors to whom the Id AO issued notice u/s 133(6) of the Act, however, the address furnished by the assessee were found to be incorrect. The assessee inspite of repeated reminders also failed to get the confirmation of those parties. Therefore, the additions were made with respect to three parties amounting to Rs. 631582/-. The Id CIT(A) deleted the addition with respect to one party to whom the notice u/s 133(6) of the Act was served. The Id CIT (A) confirmed the addition with respect to two parties to whom even the notice was not served. The assessee also could not give the correct addresses of those parties.
12. After hearing the parties we also set aside the ground No. 4 of the appeal of the assessee to the Id Assessing Officer with a direction to the assessee to substantiate the transaction with those parties by producing their bill etc. and providing their correct addresses. The assessee is also directed to produce the confirmation of those parties along with

necessary evidences. The Id AO is directed to verify the same from the books of account and decide the issue afresh. Accordingly, ground no. 4 of the appeal of the assessee is allowed with above direction.

13. Similar is the ground No. 2 of the appeal of the revenue wherein, the addition of Rs. 359400/- with respect to one party was deleted with ground No. 4 of the appeal of the assessee. Accordingly, this ground of appeal is also set aside back to the file of the Id AO with similar direction as given in appeal of the assessee. Accordingly ground No. 2 of the appeal of the AO is allowed with above direction.

14. In the result appeal of the assessee as well as the Id AO are allowed for statistical purposes.

Order pronounced in the open court on 23/10/2018.

-Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 23/10/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi