IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.6627/Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2009-10)

M/s Sumer Corporation 203, A Wing, Peninsula Corporate Park Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013.	**बनाम** / Vs.	DCIT Central Circle-5(3) R. No.1906, 19th Floor, Air India Building, Mumbai-400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACFS4279F		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Nishit Gandhi
Revenue by:	Shri Chaudhary Arun Kumar Singh (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 18/07/2019
घोषणा की तारीख /Date of Pronouncement: 19/07/2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 14.09.2017 passed by the Commissioner of Income Tax (Appeals)-53, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10.

2. The assessee has raised the following grounds of appeal: -

> *"1.1 In the facts and circumstances of the case and in law, the learned Commissioner of Income - tax (Appeals) - 53. Mumbai, ("the Ld. CIT(A)1 erred in confirming the action of the Ld. Deputy Commissioner of Income Tax (CC) - 5 (3). Mumbai ("the AO") in rejecting the rectification application filed by the Appellant under section 154 of the Act and thereby denying deduction to the Appellant under section 80-IB(10) of the Act on sale of scrap taxed as Business Income by the AO.*
>
> *1.2 While doing so. the Ld. CIT (A) failed to appreciate that:*
> *(i) the assessment order passed by the AO contained glaring, patent and factual errors which are clearly evident from the relevant assessment and other records already available with the*

AO as well as the [4. CI'!' (A) while passing the impugned order: and

(ii) the assessment order was passed without considering various judicial precedents including Judgement of the Hon'ble Jurisdictional High Court.

1.3 The ld CIT (A) erred in stating that the Appellant should have filed an appeal against the assessment order passed by the AO, completely ignoring the fact that the Appellant chose an effective alternative remedy available under the Act which could not be watered down merely because in the opinion of the Id. CIT (A) tiling of an appeal was the right remedy.

1.4 It is therefore submitted that in the facts and the circumstances of the case and in law, the order passed by the Ld. CIT(A) is liable to be held as bad and illegal and therefore be reversed.

2.1 In the facts and circumstances of the case and in law, the Ld. CIT (A) erred in confirming the action of the AO in denying deduction under section 80-IB(10) of the Act on the amounts received from sale of scrap amounting to Rs.2,00,00,000/-.

2.2 While doing so the Ld. CIT (A) failed to appreciate that:

(i) the said scrap was generated from the only project (i.e. Chandivali Project) carried out by the Appellant and the said Project is eligible for deduction under section 80-113(10) of the Act and the said sale of scrap has been taxed as Business Income by the AO himself;

(ii) there is no averment in the order(s) passed by the AO that the said project is not an eligible project; and

(iii) there is no view possible other than the one that the receipts on sale of scrap generated from the eligible project is eligible for deduction under section 80-113 of the Act;

2.3 The Ld. C1T (A) erred in stating that the claim of deduction under section 80-113(10) of the Act on the impugned receipts on sale of scrap should have been made only by way of a return, completely ignoring the fact that the said claim was not made in the return in AY 2009-10 since, on the basis of method of accounting followed by the Appellant the said income was offered to tax in AY 2011-12 instead of AY 2009-10 and claim of deduction under section 80-113(10) of the Act was made in AY 2011-12; however the AO taxed the said income in AY 2009-10 and therefore, as a logical sequitur section 80-I B(10) deduction ought to be allowed on the same in AY 2009-10.

2.4 It is therefore submitted that in the facts and circumstances of the case and in law, the order passed by the Ld. C1T (A) is liable to be held as bad and illegal and therefore be reversed.

3. The appellant craves liberty to add / alter / amend / delete / modify the grounds of appeal."

3. The brief facts of the case are that the assessee filed its return of income on 30.03.2010 declaring total income to the tune of Rs.43,70,629/-

relevant to the A.Y. 2009-10. A search and seizure operation was carried out u/s 132 of the I.T. Act, 1961 in Sumer Group of cases on 23.12.2010 including that of the assessee firm. In the search and seizure operation, certain documents pertaining to the assessee company were found. The notice u/s 153A of the Act was issued and served upon the assessee. In pursuance of notice, the assessee filed the return of income as filed earlier showing the total income to the tune of Rs.43,70,629/-. Notices u/s 143(2) and 142(1) r.w.s. 153A of the Act were issued and served upon the assessee. The assessee firm was engaged in the business of developing building and construction activities. The assessee was having on-going project namely Chandivali Project which was being constructed under Slum Rehabilitation Scheme covered under CBDT's notification No.67 of 2010 dtd.03.08.2010 and notification No.1 of 2011 dtd.5.01.2011. The project undertaken by the assessee firm has been shown by the assessee as work-in-progress (WIP). The assessee declared the income from interest and also declared income from generating electricity from non-conventional method i.e. installing wind-mill at Gujarat. The assessee intends to claim deduction u/s 80IB(10) of the Act for its project undertaken at Chandivali as the same is being undertaken and constructed under the Slum Rehabilitation Scheme. During the course of search at the residential premise of Shri Ramesh Shah at 1201/1202, Sumer Heights, Opp. Bhartiya Vidya Mandir, Chowpatty, Mumbai-7 certain incriminating documents were found and seized. Out of the said documents, one annexed as Annexure A-1 pages numbered 8-11, were detailed by him in his statement recorded on 24/12/2010 at the said premise as the bills of M/s. Dere Brothers for making charges of the silver coins distributed by him on occasion of death anniversary of his father. From the said documents, it is clear that Ramesh Shah issued silver weighing 701.861 kgs on 25.06.2008 for making of coins and for this

labour charges of Rs.10,11,600/- was payable to Shri Uday Dere. According to him, the same was unaccounted cash receipt on sale of scrap of Rs.2 crores from Chandivali Project in M/s. Sumer Corporation during the F.Y. 2008-09 which was not recorded in the books of accounts, hence, not offered for taxation in any of the previous years. The statement of the Ramesh Shah was recorded u/s 131 of the I.T. Act, 1961 and thereafter amount of Rs.2 crores was added to the income of the assessee and the total income of the assessee was assessed to the tune of Rs.2,43,70,629/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the said addition, therefore, the assessee has filed the present appeal before us.

4. All the issues are in connection with the rejecting of rectification application filed by the assessee u/s 154 of the Act in which the deduction u/s 80IB(10) of the Act has been denied on sale of scrap which has been taxed as business income by AO. The Ld. Representative of the assessee has argued that the issue has been decided by Hon'ble ITAT in the assessee's own case in ITA. No.6801 dated 26.12.2018 in favour of the assessee, therefore, in the said circumstances, the claim of the assessee is liable to be allowed. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. The copy of order dated 26.12.2018 is on the file. The relevant finding has been given as under: -

> *"27. We notice that the materials already available on record, which were listed out in the preceding paragraph, would show that the assessee has 21 entered business transactions with the above said two parties in connection with sale of TDR only. The reasoning given by the AO to reject the claim of the assessee does not emanate from the facts already available on record. Accordingly non-consideration of materials already available on record results in mistake apparent from record. Further, the decision rendered by Hon'ble Supreme Court in the case of Lakhmichand Baijnath (supra) also support the case of the assessee, which has not been considered by the AO. Hence, the reasoning mentioned by us in the earlier paragraphs, while considering the cash receipt of Rs.33.99 crores relating to sale of TDR, shall equally apply to the facts of the present case. Following the*

same, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to assess the amount of Rs.25.79 crores as business income of the assessee and consequently allow the deduction u/s 80IB(10) of the Act on the above said income.

28. The next item of receipt is cash of Rs.1.12 crores received on sale of Scrap. The AO assessed the same as income under the head income from other sources, only for the reason that the assessee did not furnish the yearwise breakup of generation of scrap and the details of parties to whom scrap was sold. Further the AO has also observed that there is a possibility that scrap might have been generated from windmill farm also.

29. It is the submission of the assessee that the assessee has generated scrap from its construction activities only and this fact has been accepted by the AO in AY 2009-10. Further the receipts on sale of scrap was assessed as business income in AY 2009-10. The Ld A.R further submitted that there is no material available on record to show that the assessee could have generated scrap from any other source, since the assessee was executing only one project, viz., Chandivali project. There is also no material to show that these scraps were generated from Wind mill operations. The Ld A.R accordingly submitted that the view so taken by the AO was not on the basis of any material available on record and, in fact, it is contrary to the facts available on 22 record as well as the decision taken by the AO himself in AY 2009-10. Accordingly he submitted that the AO has committed a mistake apparent from record in assessing the cash receipts on sale of scrap as income under the head income from other sources, thereby denying deduction u/s 80IB(10) of the Act.

30. On the contrary, the Ld D.R supported the order passed by Ld CIT(A).

31. We heard the parties on this issue and perused the record. As noticed earlier, the assessee has executed only one project during the year under consideration and accordingly, it has been claimed that the scrap has been generated from that project only. It was further submitted that the AO has accepted this fact in AY 2009-10. Further, the assessee has offered the impugned amount on the basis of seized material found during the course of search, since it was not accounted for in the books of accounts of the assessee. We notice that the assessee has offered entire amount as its income and further, the source of receipt is accepted as sale of scrap. Accordingly, the reasoning given by the AO to reject the claim of the assessee does not emanate from the facts already available on record and also contrary to the view taken by him in AY 2009-10. Accordingly, rejection of claim of the assessee without any basis and without considering the materials available on record results in mistake apparent from record. Further, the decision rendered by Hon'ble Supreme Court in the case of Lakhmichand Baijnath (supra) also support the case of the assessee, which has not been considered by the AO. Hence, the reasoning mentioned by us in the earlier paragraphs, while considering the cash receipt of Rs.33.99 crores on sale of TDR, shall equally apply to the facts of the present case. Following the same, we set aside the order

passed by Ld CIT(A) on this issue and direct the AO to assess the amount of Rs.1.12 crores as business income of the assessee and consequently allow the deduction u/s 80IB(10) of the Act on the above said income."

5. On appraisal of the above said finding, we find that the AO has already accepted the sale of scrap as business income in the A.Y. 2009-10. The claim of the assessee has been wrongly rejected and the Hon'ble ITAT by the relying upon the decision in case of **Lakhmichand Baijnath (supra) Supreme Court** has allowed the claim of the assessee. The claim of the assessee found eligible for deduction u/s 80IB(10) of the Act. However, this issue has been decided in the assessment year while deciding the case of the assessee for the A.Y. 2011-12. The only thing is that the matter of controversy is liable to be rectified even for the A.Y. 2009-10 which is the case in hand. Since this issue has duly been covered in favour of the assessee in the assessee's own case (supra), therefore, we set aside the finding of the CIT(A) on this issue and allowed the claim of the assessee.

6. In the result, the appeal of the assessee is hereby ordered to be partly allowed.

Order pronounced in the open court on this 19/07/2019

Sd/-	Sd/-
(RAJESH KUMAR)	**(AMARJIT SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 19/07/2019
Vijay/Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित //True Copy//

(Sr. Private Secretary)
ITAT, Mumbai