

आयकरअपीलीयअधिकरण,सुरतन्यायपीठ,सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, Hon'ble JUDICIAL MEMBER
AND Dr.ARJUN LAL SAINI, Hon'ble ACCOUNTANT MEMBER

(Virtual Hearing)

आ.अ.सं./I.T.A No.1195/AHD/2013

निर्धारण वर्ष / Assessment Year: 2009-10

M/s.Vipul Park, Andhar Wadi Road, Vyara, Dist. Tapi – 394 650. [PAN: AALFM 3438 P]	Vs.	The Deputy Commissioner of Income Tax, Central Circle-2, Surat.
अपीलार्थी / Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	Shri Hiren Vepari – CA
राजस्वकीओरसे /Revenue by	Ms. Anupama Singla – Sr.DR

सुनवाईकीतारीख/ Date of hearing:	26.10.2020
उद्घोषणाकीतारीख/Pronouncement on:	26.11.2020

आदेश / O R D E R

PER Dr. ARJUN LAL SAINI, AM:

By way of this appeal, the assessee has challenged correctness of the order dated 05.02.2013, passed by the Id.Commissioner of Income Tax (Appeals) Ahmedabad, in the matter of assessment u/s.143(3) of the Income Tax Act, 1961(“the Act”), for the A.Y. 2009-10. Grievances raised by the assessee which are inter-connected and will be taken up together, are as follows.

“(1).The learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the rejection of the claim of the appellant for the deduction u/s 80IB of the Act to the tune of Rs.15,62,791/-.

(2).The learned Commissioner of Income Tax (Appeals) has erred in law and on facts in determining the quantum of profits from the project of the appellant at Rs.24,00,000/- and not accepting the actual profits earned to the tune of

Rs.39,51,627/- as being the profit earned by the appellant from its project eligible for deduction u/s 80IB of the Act.

(3).It is, therefore, prayed that the ld. A.O. be directed to allow the claim of the appellant for deduction u/s. 80IB of the Act to the tune of Rs.39,51,627/- and also to accept the quantum of profits of Rs.39,51,627/- as being earned by the appellant from its project eligible for deduction u/s.80IB of the Act.

(4).The Appellant prays for granting such other relief as may be deemed just and proper by your Honours considering the factual and legal aspects of the case of the appellant.

(5).The Appellant craves leave to add, amend, alter, delete, substitute or modify any or all of the Grounds of Grounds of Appeal.”

2.Additional grounds of appeal raised by the assessee are as follows:

“1.The appellant submits that on the facts and circumstances of the case and as per law, there was no justification for disturbing the income earned from project for the purpose of grant of relief u/s.80IB(10) of the Act.

2.The appellant submits that sub-section (5), and (7) to (12) of section 80IA as mentioned in sub-section (13) of section 80IB are not applicable to the facts of the case.

3.Without prejudice to the above, higher rate of net profit, per se, cannot result on denial or reduction in relief u/s.80IB(10) of the Act.

4.Without prejudice to the above, without rejecting books of accounts, deduction u/s80IB(10) of the Act more so when book result has not been disturbed.

5.The power extended in proviso to 80IA(8) in limited compass incorrectly applied by the Assessing Officer in reducing relief u/s.80IB(10).”

3. We have gone through the original grounds of appeal as well as additional grounds of appeal raised by the assessee, as noted above. We have observed that these grounds of appeal are repetitive in nature and most of the grounds are not really grounds of appeal but these are arguments for the main grievance of the assessee, therefore we are not going to adjudicate all these arguments.

During the course of hearing, we noticed that Assessing Officer made two additions, viz:

(i).Disallowed of deduction claimed by assessee under section 80IB(10) of the Act to the tune of Rs. 39,62,791/- stating that the assessee has failed to get books of accounts audited as per Form No.10CCB and did not fulfill the conditions mentioned under section 80IB(10) of the Act.

(ii).Without prejudice, the Assessing Officer disallowed excess profits shown in business covered under section 80IB(10) of the Act, to the tune of Rs. 28,76,770/-. That is, Assessing officer rejected the books of accounts of the assessee and estimated average profit and then rejected unreasonable profit from Section 80IB(10) to the tune of Rs.28,76,770/-.

On appeal, the Id. CIT(A) held that assessee is eligible for deduction under section 80IB(10) of the Act, therefore he deleted addition of Rs.39,62,791/-, as mentioned in point no.(i) above. However, the Id. CIT(A) has re-estimated average profit and sustained the addition of Rs.15,62,791/-, (out of the addition made by Assessing officer at Rs.28,76,770/-, as mentioned in point no.(ii) above .

Thus, we have observed that the appeal filed by the assessee before this Tribunal contains multiple grounds of appeal including additional grounds of appeals. However, at the time of hearing, we have carefully perused all the grounds raised by the assessee. Most of the grounds raised by the assessee are either academic in nature or contentious in nature, as explained above. However, to meet the end of justice, we confine ourselves to the core of the controversy and solitary grievance of the assessee. With this background, we have identified the solitary grievance of

the assessee and thus we summarize and concise the ground raised by the assessee as follows:

“The learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the rejection of the claim of the appellant for the deduction u/s 80IB of the Act to the tune of Rs.15,62,791/-.”

4. The facts of the issue under consideration, which can be stated quite shortly, are as follows: The assessee principally derives income from building and construction of housing project. In the instant assessment year, the assessee has claimed deduction under section 80IB(10) of the I.T.Act, 1961. The assessee has furnished relevant details such as books of accounts, audit report, Form No.10CCB and other information, as required, before the assessing officer. The assessing officer had gone through the submissions, return of income, books of accounts and other documents furnished by the assessee, and held that assessee has not fulfilled the conditions mentioned in section 80IB(10) of the Act, hence not entitled to claim deduction under section 80IB(10) of the Act, observing as follows (to the extent relevant for our analysis):

(I)Disallowance of deduction claimed under section 80IB(10) of the Act at Rs.39,62,791/-

“6. The reply and submission of the assessee has been received and duly considered in the body of this assessment order. These submissions and replies of the assessee have been thoroughly analysed. After due deliberation and thorough reasoning of the issues at hand, the undersigned is of the following considered opinion:

7. During the relevant A.Y. the assessee has claimed to have received income of Rs. 39,62,791/-from housing project development and has claimed 100% deduction from the profits under section 80IB(10) of the I. T. Act, 1961. From the perusal of books of account, it has been found that during the year under consideration, Bungalows to the tune of Rs. 63,43,000/- has been sold by the

assessee, on which profit of Rs.39,76,668/- (Cost of area sold has been only Rs. 23,66,332/-) been shown i.e. profit rate of 62.30%. However, from the examination of previous financial performance, it has been observed that the profit rates shown during F.Y. 2007-08 has been only 8.64% on sales of Rs. 85,67,000/- (Cost of area sold has been Rs. 78,09,904/-) and 23.39% (F.Y. 2006-07) on turn-over of Rs. 1,95,91,727/-. Hence, it has been abundantly clear that the assessee has taken a huge jump in profitability of the housing project covered u/s. 80IB(10) of the I. T. Act, 1961. In such circumstances, the eligibility of the assessee concern for the deduction u/s. 80IB(10) of the I.T.Act, 1961 has been examined.....

Hence, it is clear that the assessee has failed to furnish the Form No. 10CCB as per Act and perform the statutory obligation.

As per section u/s. 80IB(13) r.w.s. 80IA(7), where the assessee is other than a co-operative society or a company, then in respect of the undertaking it is required to get its accounts audited by a Chartered accountant and to furnish Audit Report in Form No.10CCB with the return of income. Such requirement has not been fulfilled.

As per Rule 18BBB of the I.T.Rules,

...Form of audit report for claiming deduction under section 80-I or 80-IA or 56[80-IB or section 80-IC].

18BBB.(1) The report of the audit of the accounts of an assessee, which is required to be furnished under sub-section (7) of section 80-IA or sub-section (7) of section 80-I, except in the cases of multiplex theatres as defined in sub-section (7A) of section 80-IB or convention centres as defined in sub-section (7B) of section 80-IB 57 [or hospitals in rural areas as defined in sub-section (11B) of section 80-IB], shall be in Form No. 10CCB.

(2) A separate report is to be furnished by each undertaking or enterprise of the assessee claiming deduction under section 80-I or 80-IA or 80-IB 57[or 80-IC] and shall be accompanied by the Profit and Loss Account and Balance Sheet of the undertaking or enterprise as if the undertaking or the enterprise were a distinct entity.

.....

(4) In any other case, the form shall be accompanied by a copy of the agreement, approval or permission, as the case may be, to carry on the activity signed or issued by the Central Government or the State Government or the local authority for carrying on the eligible business.]”

Hence, it is clear that the assessee has failed to get its books audited as per Form No.10CCB. Any future filing of such Form would be an after-thought and post facto creation of filing. Accordingly, the entire claim of deduction u/s. 80IB is liable to disallowance. Disallowance of deduction claimed under section 80IB(10) of the Act at Rs.39,62,791”/-.”

This way, the Assessing officer has disallowed deduction claimed under section 80IB(10) of the Act at Rs.39,62,791/-.

5. Without prejudice to the above, the Assessing Officer also rejected the books of accounts of the assessee and estimated average profit and then rejected the unreasonable profits from section 80IB(10) business, observing as follows:

(II) Rejection of Unreasonable profits from 80IB(10) Business at Rs.28,76,770/-

“9.8. In light of the above discussion of facts and circumstances, the spirit and intention of the provision of sub-section 80IA(10) of the I. T. Act, 1961, are clearly applicable to the profits shown from the project eligible u/s. 80IB(10) of the Income Tax Act, 1961. Sub-section 80IA(9) of the I. T. Act, 1961 provides that:

“(9) ...Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit...”

Further, as per the spirit of s. 80IA(10), the Assessing Officer is empowered to compute reasonable profits of the eligible business, if it appears that the assessee has arranged his business to reflect more than ordinary profits, which might be expected to arise in such eligible business.

As per sub-section 80IB(13) of the Income Tax Act, 1961, the provisions contained in sub-section 80IA(9) shall also apply to the eligible business under sub-section 80IB(10) of the Income Tax Act, 1961.

10. In light of the above provisions of the Act, the normal and ordinary profits of the assessee concern is liable to be determined as per the profitability of preceding years. Since there has been no change in nature of business or the area of business or any other parameters, and on account of the failure of the assessee to explain the case for rise in profitability; the reasonable profitability of the concern is determined at the, average profit (Gross profit) rate of the concerns which prevailed during 2 preceding years. So accordingly, the ordinary profits of the assessee concern that may be allowable is worked out as under:

<i>A.Y.</i>	<i>Rate of Profit in Vipul Park Bungalow Project</i>	<i>Average ‘Ordinary ‘ Profit</i>
<i>A.Y. 2007-08</i>	<i>23.39%</i>	<i>16.02%</i>
<i>A.Y. 2008-09</i>	<i>8.64%</i>	
<i>A.Y. 2009-10</i>	<i>62.30%</i>	<i>62.30%</i>

11. There has been adequate indications and evidence that the assessee concern has transferred bungalows from the claimed eligible business at inflated prices with a view to increasing the profits of the business in the year of transfer and has designed to derive high deduction u/s. 80IB(10). The intention of the Legislature as per section 80IA(9), has

been to disallow any such move, for it requires determination of profits of the eligible business on the basis of the transfer being made at market value only which result in 'ordinary' and 'normal' profits of the concern.

12.Hence, in light of the facts that the profit eligible for deduction u/section 80IB(10) is liable to be determined at 16.02% as per the average profitability of preceding two years and the excess profit as shown in the 80IB(10) project [62.30% - 16.02% = 46.28%] stands disallowed being excessive and unreasonable and the reasonable profit of 16.02% as shown for preceding years may be adopted as eligible for purposes of deduction u/section 80IB (10) of the Income Tax Act, 1961, as per provisions of sub-section 80IA(10) r.w.ss. 80IB(13) of the I. T. Act, 1961. Hence, the claim of 100% deduction made u/section 80IB(10) of the Income Tax Act, 1961, on a sum of Rs. 28,92,500/- (Being 46.28% of sales of Rs. 62,50,000/-) stands to be disallowed.

Rejection of Unreasonable profits from 80IB(10) Business may be made at Rs.28,76,770/-

6.Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before the Id.CIT(A) who has partly allowed the appeal filed by the assessee.

(I).Learned CIT(A) deleted addition on Ist issue about eligibility of deduction u/s.80IB(10) of the Act, that is, he held that assessee is eligible to claim deduction under section 80IB(10) of the Act. Findings of the Id CIT(A) are as follows:

“4.3 Decision:

I have considered the Assessment order and the submissions of the appellants. The Income tax rule has been amended by insertion of sub rule (2) of Rule 12 by Income-tax (4th amendment) Rules, 2007 w.e.f. 14.05.2007. As per this requirement of filing the audit report along with the return of income has been done away. The appellant in the e>Returns ITR-5, under the caption audit information, has mentioned that Shri Hiren M.Diwan, Membership NO.306919 has signed the audit report on 23.09.2009. The appellant has also filed copy of 10CCB signed on 23.09.2009 by Shri Hiren M.Diwan before me. As per the audit report in form No.3CD, the same auditor in clause 26 has mentioned the claim of deduction in respect of development and building of housing project u/s.80IB of Rs.39,51,627/-. The Assessing Officer without considering the new rule 12(2) of I.T.Act, has noted that the requirement of submitting auditor's certificate in form No.10CCB along with the return of income is an absolute. The Assessing Officer, in none of 142(1) issued, has called for report in form 10CCB during the assessment proceeding. The Assessing Officer has not issued any show cause to disallow the claim of 80IB in want of 10CCB report. As the appellant has obtained form No.10CCB within the prescribed date, the requirement of 10CCB

within the prescribed date, the requirement of 80IB is fulfilled. Therefore, the appellant is eligible for benefit of section 80IB. Accordingly, this ground of appeal is allowed subject to decision in the next para.

7.However, on (II)nd issue- profit estimation, the Ld.CIT(A) denied the deduction u/s 80IB(10) at Rs.15,62,791/-, that is, the disallowance to the extent of Rs.15,62,791/- was sustained. On (II)nd issue, the findings of the Id CIT(A) are as follows: :

“Decision:

5.3 I have considered the assessment order and the submissions of the appellant The appellant during the year has shown of profit of 62.30 % from the Bungalo Project which is eligible for 80IB deduction. The profit in the preceding two years were 8.64% and 23.39 % respectively. The appellant had two more projects in the name New Bungalow project and Land Project. The expenditure in New Bungalow project during the year, shown as work in progress is Rs.86,40,026/. There is no expenditure in construction shown in the eligible project. The appellant has computed cost of plot so as under:

The cost of Area sold out at Vipul Park-Bungalow Project

	Current Year (Rs.)	Previous Year (Rs.)
(a) Total cost upto 31 st March,2009	70,97,552	1,49,07,456
(b) Estimated cost to complete the		
Project to be incurred after 31.03.2009	-	-
(c) Total cost of the Project [(a) + (b)]	70,97,552	1,49,07,456
(d) Total saleable area in the Project (in sq. mtrs.)	787.22	1653.45
(e) Cost per sq. mtr. [(c)/(d)]	9,015,.97	9,015.97
(f) Total area sold during the year (in sq. mtrs.)	<u>262.46</u>	<u>866.23</u>
(g) Cost of construction of area sold during the year [(f)/(e)]	23,66,332	78,09,904
	=====	=====

The appellant has sold bungalow of area 517.14 Sq Mts. and 715.26 Sq. Mts in A..Y 2008-09 and 2009-10 respectively but for the purpose of computation of cost it has taken only constructed area of 262.46 Sq meter and 866.23 Sq. meter respectively. In the A.Y. 2008-09 plot size of each bungalow is 102.18 Sq Meter but constructed area has been taken as 123.74 Sq. Meter. In A.Y. 2009-10, the plot size are between 84.0 Sq Meter to 112.0 Sq Meter, but constructed areas have been taken from 37.50 to 56.24 Sq. Meter for computing the cost of bungalow. While the sale price are almost same in both the years for the similar size of plot area, the cost has been computed less than half in current year, thus showing more than ordinary profit.

Applicabilty of Section 80IA(10):

"(10) Where it appears to the Assessing Officer that owing to the close connection between the assessee carrying on the eligible business to which this section applies and

any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profit which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom."

Section 80 IA(10) read with Section 80IB(13) clearly empowers the assessing officer in computing the profit and gain of eligible business for the purpose of the deduction under section 80IB as may be reasonably deemed to have been derived in cases where the assessee for any reason arranges the business in such a way that it produces more than ordinary profit in eligible business. Appellant has not shown any expenditure in cost of construction of eligible project, but shown Rs.86,40,026/- in New Bungalow Project, without showing any income there. Therefore, the Assessing Officer was justified in invoking section 80IA(10) in the given circumstances. As regards arguments of appellant that the Assessing Officer cannot estimate the profit without rejecting the books of accounts the argument is not tenable as section 80 IA(10) itself empowers the Assessing Officer to take the amount of profits as may be reasonable deemed to have been derived. The Assessing Officer needs to reject the book of account for estimating the profit to be included in total income not in the case of computing the profit and gain of eligible business for the purpose of deduction under section 80IB, which has been expressly provided in the statute. The case laws relies, therefore, are also not relevant for the purpose of estimation u/s 80IA(10)/80IB(10).

Estimation of Profit:

The Assessing Officer for the purpose of computing eligible profit u/s.80IA has taken the average profit of A.Ys. 2007-08 & 2008-09 at (23.39% + 8.64%) divided by 2 which comes to 16.02%. The bungalow project which was started in A.Y.2007-08 was completed by the end of 31st March,2008. The appellant has shown profit of 23.39% in A.Y.2007-08, 8.64% in A.Y.2008-09, 62.30% in A.Y.2009-10 and 59.41% in A.Y.2010-11. Therefore, the average profit of entire project as per the appellant comes to 38.4%. The appellant while computing the profit, has computed the cost on the basis of constructed area. The plot has normally been sold as per the plot area rather than the constructed area. While computing the cost of construction in A.Y. 2008-09, the appellant has taken the constructed area of 866.23 sq. mts. and 262.46 sq. mts in A.Y. 2009-10, while the plot area is 715.26 sq. mts. and 517.14 sq. mts. for A.Ys. 2008-09 & 2009-10 respectively. In case the cost of construction of bungalow is computed on the basis of area of plot, the cost of bungalow would come higher than the computation made by the appellant on the basis of constructed area. The higher profit shown by the appellant in the current year is due to method of computation of cost of bungalow sold.

Considering all the above facts, it is fit to estimate the profit from Project Bungalow for the current year for the purposes of section 80IB at 38.4% which is average profit of the project. Accordingly, the eligible amount and the purpose of deduction u/s. 80IB on the sale of Rs.62,50,000/- is computed at Rs.24,00,000/-. The Assessing Officer has disallowed claim of Rs.39,62,791/- u/s.80IB. Accordingly, the disallowance to the extent of Rs.15,62,791/- is sustained and the appellant gets relief of Rs.24,00,000/-."

8. After going through the order of Id CIT(A) on both the issues, as noted above, we have observed that the Id. CIT(A) has held that the assessee is eligible for deduction under section 80IB(10) of the Act, as the assessee has fulfilled all the conditions mentioned in section 80IB(10) of the Act, therefore he deleted addition of Rs.39,62,791/-, as mentioned in point no.(I) above. However, the Id. CIT(A) has re-estimated average profit and sustained the addition of Rs.15,62,791/-, (out of the addition made by Assessing officer at Rs.28,76,770/-, as mentioned in para 7 of this order.

9. Aggrieved by the order of Ld.CIT(A), the assessee is in appeal before us only for addition sustained by Id CIT(A) to the tune of Rs.15,62,791/-, (out of the addition made by Assessing officer at Rs.28,76,770/-, as mentioned in para 7 of this order. That is, assessee is praying before the Bench that addition sustained by Id CIT(A) to the tune of Rs.15,62,791/- may be deleted.

10. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id.CIT(A) and other materials brought on record. Before us, Id.Counsel for the assessee has just reiterated the submissions made before the Id.CIT(A). On the other hand, the Learned Departmental Representative (DR) for the Revenue has reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and is not being repeated for the sake of brevity. The main question before us is that whether Id Assessing officer and Id CIT(A) are right in

estimating the average profit for the purpose of partly denial of deduction under section 80IB(10) of the Act?

The Assessing officer was of the view that assessee has shown excess profit to claim more deduction under section 80IB(10) of the Act, therefore, he proceeded to estimate average profit of the assessee without rejecting books of accounts of the assessee. Learned Counsel submits before us that only the unit/quantity contained in the opening stock has been sold during the assessment year under consideration, therefore there was no need to estimate the profit, as the veracity of the opening stock has not been challenged by the Assessing Officer. That is, profit has been earned by the assessee only by selling opening stock. After hearing the Id Counsel, we noticed that Assessing Officer has not challenged the correctness of the opening stock of the assessee. The closing stock of the previous year of the assessee becomes opening stock in the current year i.e. (assessment year under consideration), which is sold by the assessee during the assessment year under consideration. The Assessing Officer did not find any defect in the opening stock of the assessee. In order to ascertain the veracity of profit declared by the assessee, the assessing officer should have examined the correctness of the opening stock, which is sold by the assessee during the assessment year under consideration. We note that the Assessing Officer, vide para 10 of his order has stated as follows:

“10. In light of the above provisions of the Act, the normal and ordinary profits of the assessee concern is liable to be determined as per the profitability of preceding years. Since there has been no change in nature of business or the area of business or any other parameters, and on account of the failure of the assessee to explain the case for rise in profitability; the reasonable profitability of the concern is determined at the, average profit (Gross profit) rate of the concerns which prevailed during 2 preceding years. So accordingly, the ordinary profits of the assessee concern that may be allowable is worked out as under:

A.Y.	Rate of Profit in Vipul Park Bunglow Project	Average 'Ordinary Profit
A.Y. 2007-08	23.39%	16.02%
A.Y. 2008-09	8.64%	
A.Y. 2009-10	62.30%	62.30%

Thus, the Assessing Officer has observed that rate of project in Vipul Park Bungalow Project during the A.Y. 2009-10 was at 62.30% which according to him was very high to claim the deduction u/s.80IB(10) of the Act. The Assessing Officer was of the view that assessee has deliberately shown higher profit in the A.Y. 2009-10 to get more deduction u/s.80IB(10) of the Act, so as to minimize the tax burden in the years to come. Therefore, the Assessing Officer determined the normal average profit @16.02% by taking two previous years' average profit i.e. for A.Y. 2007-08 and A.Y. 2008-09 (23.39% + 8.64% / 2).

This way, the Assessing Officer worked out excess profit shown in the 80IB(10) project @46.28% (in terms of percentage) and worked out the unreasonable profit in terms of quantum at Rs.28,76,770/-. The Assessing Officer has done this over and above the entire disallowance of deduction u/s.80IB(10) at Rs.39,69,791/-. The disallowance of unreasonable profit at Rs.28,76,770/- has not been added to the total income of the assessee, as it was computed by Assessing Officer, without prejudice to entire disallowance of deduction u/s.80IB(10) at Rs.39,62,791/-.

To estimate the average profit, the opening stock plays an important role in assessee's case, as the profit earned by the assessee is because of selling the opening stock, as explained above. We note that Assessing officer worked out the unreasonable profit in terms of quantum at Rs.28,76,770/-, without pointing out any defect in the opening stock, which was sold during the year, hence estimation of average profit by the Assessing Officer without having noticed any defect in the opening stock, is not justifiable.

11.On appeal, Ld.CIT(A) upheld the action of the Assessing Officer, (so far estimation of average profit is concerned), observing as follows:-

“5.3..... As regards arguments of appellant that the Assessing Officer cannot estimate the profit without rejecting the books of accounts, the argument is not tenable, as section 80IA(10) itself empowers the Assessing Officer to take the amount of profits as may be reasonable deemed to have been derived....”

We note that concept of “reasonable profit” has been provided by the legislature in section 80IA(10) of the Act, only. The said concept of determination of

“reasonable profit” is not available in section 80IB(10) of the Act. The Assessing Officer cannot use the concept of “reasonable profit” which is the subject matter of section 80IA(10) of the Act, for the purpose of section 80IB(10) of the Act, as object of both the sections are different. The legislature has enacted the provisions of section 80-IA for the purpose of “Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.” whereas, the provisions of section 80IB(10) are enacted for the purpose of “Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings”.

After going through the provisions of section 80IA(10) and section 80IB(10), one can understand that object and purpose of both the sections are different, hence the provisions of sub-section 10 of section 80IA should not be used for the purpose of sub-section 10 section 80IB of the Act, unless expressly provided by the statute. Therefore, the view taken by the Ld.CIT(A) to the effect that ‘**section 80IA(10) itself empowers the Assessing Officer to take the amount of profit as may be reasonable deemed to have been derived**’ is not acceptable, as the purpose and object of both the sections are different, as explained above.

Law is well settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim '*Expressio unius est exclusion alteris*', meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and

following of other course is not permissible. (Nazir Ahmed v. King Emperor AIR 1936 PC 253; Ram Phal Kundu v. Kamal Sharma [2004] 2 SCC 759 and Indian Bank's Association v. Devkala Consultancy Service AIR 2004 SC 2615). Similar view has been expressed in the Orissa Rural Housing Development Corpn. Ltd, 343 ITR 316(Orissa). Hence, average estimated profit computed by the Assessing Officer is bad in law.

12.It may also be noted that Ld.CIT(A) has further re-estimate the average profit of the assessee @ of 38.4%, as against the average profit @16.02% estimated by Assessing Officer. The Assessing Officer took two years profit i.e. 2007-08 and 2008-09 (profit @23.39% and @8.64% respectively) to find out the average profit @16.02% $[(23.39\% + 8.64\%)/2]$. However, Ld.CIT(A) took four years profits, i.e. A.Y. 2007-08 @23.39%, A.Y. 2008-09 @ 8.64% F.Y. 209-10 @62.30% and A.Y. 2010-11 @ 59.41% to find out the average profit, which comes at 38.40%. This way, the average profit computed by the assessing officer was rejected by ld CIT(A) and then ld CIT(A) has re-estimated the average profit of the assessee. Thus, for the sake of argument, it can be said that the Department itself is not certain in estimating the average profit of the assessee, as the average profit computed by the assessing officer has been overruled by ld CIT(A). Normally, to compute the average profit, the past years profit rate is taken into account, however, in assessee's case, the subsequent year's profit rate i.e. A.Y. 2010-11 has also been considered by Ld.CIT(A) to compute average profit, which is not acceptable.

13. We note that the Assessing Officer has held that assessee is not eligible to claim deduction u/s 80IB(10) and therefore has disallowed the entire deduction claimed by assessee u/s.80IB(10) at Rs.39,62,791/-. Besides, over and above, without prejudice, the Assessing Officer estimated average profit @16.02% and thus rejected the unreasonable profits from 80IB(10) business at Rs.28,76,770/-. However, the Assessing Officer has not added Rs.28,76,770/- to the total income of the assessee. On appeal, the Ld.CIT(A) held that assessee is eligible and entitled to claim deduction u/s.80IB(10) of the Act. At the cost of repetition, the relevant observation of Ld.CIT(A) (to the extent relevant for over analysis) is reproduced below:-

“4.3 Decision:

I have considered the Assessment order and the submissions of the appellant. The Income tax rule has been amended by insertion of sub rule (2) of Rule 12 by Income-tax (4th amendment) Rules, 2007 w.e.f. 14.05.2007. As per this requirement of filing the audit report along with the return of income has been done away. The appellant in the e-return ITR-5, under the caption audit information, has mentioned that Shri Hiren M.Diwan, Membership No.306919 has signed the audit report on 23.09.2009. The appellant has also filed copy of 10CCB signed on 23.09.2009 by Shri Hiren M.Diwan before me. As per the audit report in form No.3CD, the same auditor in clause has mentioned the claim of deduction in respect of development and building of housing project u/s.80IB of Rs.39,51,627/-. The Assessing Officer without considering the new rule 12(2) of I.T.Act, has noted that the requirement of submitting auditor's certificate in form No.10CCB along with the return of income is an absolute. The Assessing Officer, in none of 142(1) issued, has called for report in form 10CCB during the assessment proceeding. The Assessing Officer has not issued any show cause to disallow the claim of 80IB in want of 10CCB report. As the appellant has obtained form No.10CCB within the prescribed date, the requirement of 80IB is fulfilled. Therefore, the appellant is eligible for benefit of section 80IB. Accordingly, this ground of appeal is allowed subject to decision in the next para.”

Thus, it is abundantly clear from the order of Ld.CIT(A) that assessee filed copy of form No.10CCB. The assessee also filed audit report in form no.3CD and claimed deduction u/s.80IB of Rs.39,51,627/- in respect of development and

building of project, therefore, Ld.CIT(A) held that since assessee had fulfilled the requirement of section 80IB of the Act, hence, the assessee is entitled for deduction u/s.80IB of the Act and therefore Ld.CIT(A) deleted the disallowance of deduction u/s.80IB of the Act at Rs.39,62,791/-.

However, at the same time, we note that Ld.CIT(A) made self-contradictory statement and restricted the deduction under section 80IB of the Act at Rs.24,00,000/- (38.40% at Rs.62,50,000/-) by re-computing estimated average profit @38.40%, as against average profit computed by the Assessing Officer @16.02%. Now the question before us is that whether Ld.CIT(A) can re-estimate average profit @ 38.40%?

14.We note that the Assessing Officer has attempted to use the proviso of sub-section 8 of section 80IA of the Act, which reads as follows:

“(8) Where any goods [or services) held for the purpose of the eligible business are transferred to any other business carried on by the assessee, or where any goods [or services) held for the purpose of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods (or services) as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods (or services) as on that date :

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

[Explanation.- For the purposes of this sub-section “market value”, in relation to any goods or services, means –

- (i) the price that such goods or services would ordinarily fetch in the open market; or*
- (ii) the arm’s length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA]*”

From the bare reading of the proviso to sub-section (8) of section 80IA, as noted above, it seems that it has limited application to the prescription of sub-section 8 of section 80IA of the Act. The Sub-section 8 of section 80IA talks about where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee or where any goods held for the purposes of any other business carried on by the assessee are transferred to the eligible business. If the consideration for such transfer does not correspond to the market value of such goods or services then assessing officer for the purpose of deduction under section 80IA, the profit and gains of such eligible business shall be computed, as if, the transfer had been made at the market value of such goods/services. Therefore, the purpose of sub-section 8 of section 80IA is to compute the market value of such goods/services.

The proviso to sub-section 8 of section 80IA directs the Assessing Officer to compute such profits and gains on such reasonable basis as the Assessing Officer may think fit. Therefore, sub-section 8 section 80IA talks about determination of market value of such goods and services which do not apply to the assessee's case under consideration.

Thus, we note that the Assessing Officer has incorrectly invoked the power mentioned in section 80IA(8) to restrict the relief of the assessee under section 80IB(10) of the Act. There is no provision under section 80IB(10) that empowers the Assessing Officer to ascertain market value of goods or services on transfer of eligible business. Therefore, to use the powers given in section 80IA(8) to restrict the relief given to assessee by section 80IB(10) is not acceptable, as the object and

purpose of both sections, viz section 80IA(8) and section 80IB(10) is different. Therefore, the Assessing Officer has wrongly exercised his power given under section 80IA(8) for restricting the benefit given to assessee under section 80IB(10) of the Act, hence, we do not agree with the action of the Assessing Officer in estimating the average profit of the assessee.

15.Conclusion:

We note that neither the Assessing Officer nor Ld.CIT(A) has disputed any of the qualifying conditions specified under section 80IB(10) of the Act. The powers given to assessing officer under sub-section 8 of section 80IA or 80IA(10) should not be used to restrict the benefit given to assessee under section 80IB(10) of the Act, as schemes of these sections are different. We also note that the Assessing Officer has estimated the assessee's average profit @16.02%. On appeal, Ld.CIT(A) re-estimated the assessee's average profit @38.40% and computed the eligible amount of deduction u/s.80IB(10) of the Act, without rejecting books of accounts. The assessee's books of accounts are audited by a Chartered Accountant and no any defect was pointed out by the Assessing Officer. Sales invoices filed by the assessee during the assessment proceedings were not doubted by the Assessing Officer. Learned Counsel submits before the Bench that during the assessment year under consideration, the assessee did not incur any cost, only opening stock was sold. The closing stock of the previous year becomes opening stock of the current assessment year, which is not doubted by the Assessing Officer. Therefore, without proving the opening stock as wrong, which is important item in assessee's case, the Assessing Officer was not justified in estimating the average profit of the assessee.

The Ld.Counsel also contends that sales price in A.Y. 2007-08 and A.Y. 2008-09 were same and there is no any finding in the assessment order that assessee has incurred lesser cost as compared to previous year.

The contention and arguments advanced by the Id Counsel along with the materials relied upon have been duly considered against the backdrop of the Assessing Officer`s action in estimating average profit and re-estimating profit by Id CIT(A). On an overall analysis, we find that this is a case where the Assessing Officer and Id CIT(A) has estimated average profit without any base. Taking a holistic view in the matter on considering both sides, we are of the view that assessee is entitled to take deduction u/s.80IB(10) of the Act. The estimation of average profit by assessing officer and re-estimation of average profit by Id CIT(A) are not in accordance with law, as narrated above, hence we delete the addition of Rs.15,62,791/-.

16.In the result, appeal of the assessee is allowed.

Order pronounced on 26-11-2020 as per Rule 34(5) of ITAT Rules.

Sd/-
(PAWAN SINGH)
(न्यायिक सदस्य /JUDICIAL MEMBER)

Sd/-
(Dr.ARJUN LAL SAINI)
(लेखा सदस्य/ACCOUNTANT MEMBER)

सुरत/ Surat, दिनांक Dated: 26th Nov, 2020/S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/ASSESSING OFFICER/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat