IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A. No.7246/Mum/2011 - 2008-09

Dy.CIT 24(3), Mumbai	vs	M/s Siroya Developers 43, Sun Villa, Yashodham Gen. A.K. Vaidya Marg Goregaon (E), Mumbai-63
		PAN : AANFS1544G
(Appellant)		(Respondent)

I.T.A. No.4527/Mum/2013 - 2009-10

ACIT,24(3), Mumbai	vs	M/s Siroya Developers 43, Sun Villa, Yashodham Gen. A.K. Vaidya Marg Goregaon (E), Mumbai-63
		PAN : AANFS1544G
(Appellant)		(Respondent)

I.T.A. No.4031/Mum/2013 - 2009-10

M/s Siroya Developers 43, Sun Villa, Yashodham Gen. A.K. Vaidya Marg Goregaon (E), Mumbai-63	Vs	Dy.CIT 24(3), Mumbai
PAN : AANFS1544G		
(Appellant)		(Respondent)

Assessee by	Dr. K Shivaram & Shri Rahul Hakani
Revenue by	Ms. Anupama Singla

Date of hearing : 22-11-2016
Date of order : 30 -11-2016

O R D E R

Per ASHWANI TANEJA, AM:

These appeals pertain to same assessee and involve identical issues. Therefore, these were heard together and being disposed of by this common order.

2. First we shall take up ITA No.7246/Mum/2011- A.Y. 2008-09:

This appeal by the Revenue is against the order of the Commissioner of Income-tax (Appeals) dated 03-09-2011 passed against the assessment order passed u/s 143(3) dated 21-12-2010 and is filed on the following grounds:-

"1. "On the facts & in the circumstances of the case and in law, the Ld.CIT(A) erred in allowing the deduction claimed u/s 80IB(10) by the assessee, ignoring the detailed reasons given by the AO in the assessment order that the assessee failed to fulfil with the conditions laid down for the said section. Moreover, the CIT(A) admitted additional evidences in contravention to Rule 46A of the I.T. Rules, 1962."

2. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred deleting the disallowance of Rs.44,28,785/- made by the AO being 25% of the purchases when no reply was received in response to notice u/s.133(6) without considering that the assessee failed to discharge the primary onus of proving the identity and genuineness of the parties."

3. Ground 1: In this ground, the Revenue has challenged the action of Ld.CIT(A) in allowing deduction claimed u/s 80IB(10) by the assessee, by admitting additional evidences by the CIT(A) in contravention of Rule 46A of I.T. Rules, 1962. It has also been alleged by the Revenue that the Ld.CIT(A) has ignored the detailed reasons given by the AO in the

assessment order alleging that assessee failed to fulfil the conditions laid down u/s 80IB(10).

4. During the course of hearing, the Ld. DR submitted that in this case additional evidences have been submitted by the assessee which is evident from the certificate given in the paper book. These additional evidences were considered by Ld. CIT(A) for allowing deduction u/s 80-IB(10) to the assessee. But no remand report was called for from the AO, and nor any proper reasoning was given for admission of these evidences. Thus, the order passed by the Ld. CIT(A) is in violation of principles of natural justice and also contrary to law.

5. Per contra, the Ld. Counsel fairly submitted that in this case, the Ld. CIT(A) has called for few additional evidences which were submitted by the assessee and these were considered by him before allowing relief to the assessee, but no remand report was called for by the Ld.CIT(A), as per the knowledge of the assessee.

6. We have considered the orders passed by the lower authorities. The AO denied the benefit of section 80IB(10) to the assessee *inter-alia* on the ground that area of each unit was more than 1000 sq.ft., in violation of sub clause (c) of sub section (1) of section 80IB. While analysing the facts of the case, the Ld. CIT(A) placed reliance upon the certificate obtained from Bombay Municipal Corporation for arriving at the conclusion that none of the units was having area above 1000 sq.ft. Thus, the additional evidence considered by the Ld. CIT(A) has a material bearing on the decision taken by him. Under these circumstances, it was incumbent upon him to confront these evidences to the AO and seek his comments. In absence of the same, the order passed by the Ld. CIT(A) is

passed in violation of principles of natural justice. After taking into account all the facts and circumstances of the case, we find it appropriate to send this issue back to the file of the AO. The assessee shall submit all the evidences before the AO in support of its claim and shall be free to raise all legal and factual issues before the AO. The AO shall give adequate opportunity of hearing to the assessee and shall decide this issue afresh after considering all the details and evidences and judgements as may be placed by the assessee before him. The assessee shall also file its submissions along with requisite evidences with regard to all the reasons given by the AO in the assessment order which shall be duly considered by the AO before deciding this issue afresh. With these directions, this issue is sent back to the file of the AO. This ground may be treated as allowed for statistical purposes.

7. Ground 2: In this ground, the Revenue has challenged the action of Ld. CIT(A) in deleting the disallowances made by the AO being 25% of the projects.

8. During the course of hearing, it was fairly submitted by the Ld. Counsel that the outcome of ground 1 shall have direct bearing on this issue. Since we have restored the issue in ground 1 to the file of the AO, this issue is also restored to the file of the AO. The AO shall decide the issue after affording opportunity of hearing to the assessee.

9. As a result, the appeal of the Revenue may be treated as allowed for statistical purposes.

10. Now we shall take up the appeal in ITA No.4031/Mum/2013 for A.Y. 2009-10 filed by the assessee against the order of Commissioner of

Income-tax (Appeals) dated 25-03-2013 passed against the assessment order passed u/s 143(3) dated 19-12-2011 on the following grounds:-

> *"1. The Ld. CIT(A) erred in confirming action of the A.O. in disallowing deduction u/s 80IB(10) at Rs. 86,69,941 /- without properly appreciating the facts of the case and law applicable thereto.*
> *2. The Ld. CIT(A) erred in confirming disallowance of deduction u/s 80IB(10) merely on the technical ground that the return was not filed on time.*
> *3. The Ld. CIT(A) failed to appreciate that the delay was bonafide and due to the reasons beyond the control of the assessee, hence, should have been condoned.*
> *4. The appellant prays that the deduction claimed u/s 80IB(10) in the return may be allowed."*

11. In this appeal also, though the issue involved on merits is with regard to denial of benefit of deduction u/s 80IB(10), but the preliminary hurdle in this appeal was with regard to the rejection of the claim u/s 80IB(10) by applying provisions of section 80AC due to non filing of return of income by the assessee within due date as prescribed under the provisions of section 139(1) of the Income-tax Act, 1961. It was submitted by the Ld. Counsel during the course of hearing that though the return could not be filed by the assessee u/s 139(1) of the Act, but the same was duly filed within the time limit as prescribed u/s 139(4) and therefore, the return filed by the assessee should be deemed to have been filed u/s 139(1) r.w. the provisions of section 139(4) and therefore, provisions of section 80AC should not be made applicable upon this case. In support of his arguments, he relied upon the judgment of Mumbai Bench of the Tribunal in the case of Income Tax Officer vs Yash Developers dt 31-01-2014 in ITA No.809/Mum/2011 and Income Tax Officer vs Uma Developers dt 10-08-2016 in ITA No.77181/Mum/2014 wherein return filed by the

assessee u/s 139(4) was accepted and benefit of deduction u/s 80IB(10) was held as allowable.

12. Per contra, the Ld. DR submitted with respect to this preliminary issue that section 80AC stipulates filing of return by tan assessee specifically u/s 139(1) for getting the benefit of deduction u/s 80IB(10). Thus, in absence of compliance of this condition, the assessee should not be granted the benefit of the deduction. In support of her arguments, she relied upon the judgement of the Special Bench of the Tribunal in the case of Saffire Garments vs ITO 140 ITD 6 (Rajkot)(SB).

13. We have gone through the orders passed by both the sides and also judgements placed before us. Before deciding this appeal on merits of the issue raised, we find it necessary to first decide the preliminary issue. During the course of assessment proceedings, it was noted by the AO that in this case the due date for filing of return u/s 139(1) was 30-09-2009 whereas the assessee filed its return on 14-10-2010 u/s 139(4). It was held by him that since the return was filed u/s 1349(1), the assessee was not eligible for deduction u/s 80IB(10) of the Act. Before the Ld.CIT(A) the assessee explained that there was delay in filing of return of income by 379 days on account of the reasons beyond the control of the assessee on the ground that the accountant of the assessee had met with an accident and got hospitalised. However, the return was filed within extended time limit permitted under the law as prescribed in section 139(4). But, the Ld. CIT(A) did not agree with the submissions of the assessee and held that no reasonable cause has been explained and duly supported by the assessee along with the requisite evidences. The Ld. CIT(A) refused to interfere in

the order of the AO on this issue and therefore, benefit of deduction was denied for not filing the return of income u/s 139(1).

14. We have gone through the legal position in this regard. It is noted that provisions of section 80AC reads as follows:

> *"**80AC. Deduction not to be allowed unless return furnished**- Where in computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-lA or section 80-IAB or section 80-IB or section 80-IC or section 80-ID or section 80-IE, no such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139."*

A perusal of this section reveals that mandate of this section is very clear that to avail the benefit of deduction u/s 80IB, the assessee is required to file return within the due date as prescribed u/s 139(1) of the Act. It is noted that section 139(4) was existing when section 80AC was brought on the statute and thus, the legislature was conscious of this fact that return could be filed within the extended time as prescribed u/s 139(4), but the legislature chose to grant the benefit of deduction only when the return was filed u/s 139(1). If the intention was to grant the benefit of deduction, even in those cases when the return was filed u/s 139(4), then the same would have been mentioned by the legislature in section 80AC that return is filed u/s 139(1) or within the time extended by section 139(4). It appears that the whole objective of bringing section 80AC was to encourage the assessees to file the return within time as stipulated u/s 139(1) and to discourage them from late filing of return. Section 80AC was brought into the statute by Finance Act, 2006. Explanatory Notes to

the provisions relating to direct taxes were as given in circular No.14/2006 dated 28-12-2006 which read as follows:

> *""10. Benefits of certain deductions not to be allowed in cases where return is not filed within the specified time limit*
>
> ***10.1*** ***Section 139(1) casts an obligation on every assessee to furnish the return of income by the due date. With a view to enforce the compliance in this regard by the assessees who are entitled for deduction*** *under section 10B from their income, a proviso (fourth proviso) to sub-section (1) of section 10B has been inserted so as to provide that no deduction under section 10B shall be allowed to an assessee who does not furnish a return of his income* ***on or before the due date specified in sub-section (1) of section 139.*** *Similarly, with a view to enforce the compliance for furnishing the return of income by the due date by the assessees who are entitled for deductions under section 80-IA or section 80-IAB or section 80-IB or section 80-IC from their income, a new section 80AC has been inserted so as to provide that no deduction under section 80-IA or section 80-IAB or section 80-IB or section 80-IC shall be allowed to an assessee* ***who does not furnish a return of his income on or before the due date specified in sub-section (1) of section 139.***
>
> ***10.2*** *This amendment takes effect retrospectively from 1-4-2006 and applies in relation to the assessment year 2006-07 and subsequent years." (emphasis supplied in bold and underline)*

Perusal of the above shows that the legislature has clearly intended that benefit of aforesaid deductions should not be allowed in the cases were return is not filed within the specified time limit as prescribed in section 139(1). The whole idea of bringing this piece of legislation on the statute was to streamline and bring efficiency in the system of filing of returns, issuing refunds and carrying out assessment proceedings, etc. in an efficient and time bound manner. This obligation has been cast upon the assessee by the legislature for a valid purpose. Under these circumstances, it would not be fair, justified and legally permissible on our

part to add other section i.e. section 139(4) as is requested by the assessee, since it may amount to dilution of the object of the section. It is further noted by us that the **Special Bench of the Tribunal** has taken similar view in the case of **Saffire Garments (supra)** wherein it has been opined that filing of return within the time limit prescribed u/s 139(1) is mandatory to claim the benefit of deduction u/s 80IB(10). Since we are bound by the decision of the Special Bench, it would not be permissible for us to refer to the view taken by the co-ordinate bench of Mumbai ITAT as has been relied upon by the Ld. Counsel before us.

15. In addition to that it is also noted by us that identical issue came up before Hon'ble Calcutta High Court in similar circumstances in the case of **CIT v. Shelcon Properties P. Ltd.370 ITR 305(Cal)** wherein the benefit of deduction u/s 80IB(10) was denied by the AO by applying the provisions of section 80AC on the ground that the return was not filed by the assessee within the time limit prescribed u/s 139(1). The claim was allowed by the Tribunal on the ground that there was lack of negligence on the part of assessee in filing the return late and there was reasonable cause for delay in filing of return .

15.1. The Revenue carried the matter before Hon'ble Calcutta High Court and contended that provisions of section 80AC were clear and law could not have been rewritten by the Tribunal to accommodate the assessee, disregarding the clear provisions of section 80AC which mandates filing of return within the time limit as prescribed u/s 139(1). After considering legal position in detail, Hon'ble High Court accepted the contentions of the Revenue and held that filing of return u/s 139(1) was mandatory for

an assessee to be eligible to claim deduction u/s 80IB(10). Operative part of the observations of the Hon'ble High Court are reproduced hereunder:

> *"Mr. Khaitan submitted that the provision regarding filing of the return on or before the prescribed day is directory in nature. We are unable to concur with him. The benefit in the present case can only be claimed in case of fulfillment of the preconditions laid down under section 80AC of the I.T. Act. When the preconditions have not been fulfilled, the benefit cannot be claimed. There is, as such, no reason to find out whether the direction is directory or mandatory. In any event, when the provision is that the benefit cannot be claimed if the return has not been filed on or before the prescribed day, in our view, it is a mandatory direction which prescribes the consequence of omission to file the return in time. The Courts cannot rewrite the law to do what is just according to them as rightly pointed out by Mrs. Bhargava.*
>
> *All the judgments cited by Mr. Khaitan have thus been dealt with. It was also the submission of Mr. Khaitan that neither of these judgments is on point which has arisen in this case. We are inclined to think that the benefit can only be availed by the assessee if he has filed his return on time. If he has not filed his return on time, the benefits cannot be claimed."*

15.2. Similar view has been taken by the Hon'ble Uttarakhand High Court in the case of Umesh Chandra Dalakoti v. ACIT (dated 27th August 2012, in ITA No.7/2012) by holding that provisions of section 80AC are mandatory.

16. Thus, in view of the aforesaid legal discussion and facts of this case, it is held that assessee has failed to fulfil the condition of filing of return u/s 139(1) and, therefore, the assessee was not eligible for the benefit of deduction u/s 80IB(10) in view of clear provisions of section 80AC of the Act. Thus, the action of the lower authorities on this issue is upheld. Since we have rejected the claim of the assessee on the preliminary ground, we are not going into the merits of the case at this stage. As a result, appeal of the assessee is dismissed.

17. Now we shall take up appeal filed by the Revenue for A.Y. 2009-10 in ITA No.4527/Mum/13 against the order of the Commissioner of Income-tax (Appeals) dated 25-02-2013 passed against assessment order dated 19-12-2011 u/s 143(3) dated 19-12-20111 on the following grounds:

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made on account of section 2(22)(e) of the Act ignoring that the advances received by the assessee was from a concern, in which one of the partner's of assessee was holding major share and the advances so received by the assessee were liable to taxed as deemed dividend as per provisions of section 2(22)(e) of the Act."*

18. The only ground raised in this appeal is with regard to the addition made by the AO as deemed dividend u/s 2(22)(e) of the Act on account of advances received by the assessee from a concern in which one of the partners of the assessee firm was holding major share holding, which was deleted by Ld.CIT(A).

19. The brief facts on this issue are that it was noted by the AO from the balance-sheet of the assessee that assessee had received an amount as loan from M/s Siroya FM Construction Pvt Ltd wherein one of the partners of the assessee firm namely Shri Shrenik D Siroya was holding major share holding and the said partner was having 50% share in the assessee firm also. Under these circumstances, applying the provisions of section 2(22)(e), the AO treated this amount as deemed dividend in the hands of the assessee firm. In the appeal before the Ld. CIT(A), it was *inter-alia* submitted by the assessee that deemed dividend could be assessed only in the hands of the person, who has shareholder in the lender company and not in the hands of the borrowing concern in which

such shareholder was member or partner having substantial interest. Since the assessee firm was **not** shareholder in the lender company, viz. M/s Siroya FM Construction Pvt Ltd, the impugned amount of loan cannot be taxed in the hands of the assessee firm as deemed dividend. Reliance was placed by the assessee on the judgment of Hon'ble Bombay High Court in the case of CIT vs Universal Medicare Pvt Ltd 324 ITR 263 (Bom). Ld. CIT(A) considered the submissions of the assessee and found that the issue was covered in favour of the assessee by relying upon the judgment of Hon'ble Bombay High Court in Universal Medicare Pvt Ltd (supra) as well as the judgment of the Special Bench of the Tribunal in Bhaumik Colour Pvt Ltd 319 ITR 146 (AT)(MUM SB).

20. During the course of hearing before us, both the parties jointly agreed that the issue stands covered in favour of the assessee in view of the judgment of Hon'ble Bombay High Court in Universal Medicare Pvt Ltd (supra) and there is no dispute on facts. We have gone through the orders passed by the lower authorities as well as facts of this case and find that the judgement of the Hon'ble Bombay High Court is squarely applicable to this case. Therefore, in view of the same, we do not find any reason to interfere in the order of the Ld. CIT(A); the same is hereby upheld.

21. As a result, appeal filed by the Revenue is dismissed.

Order pronounced in the court on this 30th day of November, 2016.

Sd/-	Sd/-
(MAHAVIR SINGH)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 30th November, 2016

Pk/-

Copy to :

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, E -Bench

(True copy) By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES