आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ ।

IN THE INCOME TAX APPELLATE TRIBUNAL,
"C" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA.No.1520/Ahd/2013**

निर्धारण वर्ष/ Asstt. Year: 2008-2009

Ganesh Plantation Ltd. "Ganesh Corporate House" Hebatapur –Thaltej Road Nr.Sola Bridge Off. C.G. Highway Ahmedabad 380 054. PAN : AAACG 7004 R	Vs.	ITO, Ward-4(1) Ahmedabad.

(Applicant)		**(Responent)**

Assessee by :	Shri Dhiren Shah, AR
Revenue by :	Shri Prasoon Kabra, Sr.DR

सुनवाई की तारीख/**Date of Hearing : 24/11/2016**
घोषणा की तारीख /**Date of Pronouncement: 06/12/2016**

आदेश/O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER:

Assessee is in appeal before the Tribunal against order of ld.CIT(A)-XXI, Ahmedabad dated 26.3.2013 passed for Asstt.Year 2008-09.

2. Grounds of appeal taken by the assessee are not in consonance with the Rule 8 of the Income Tax (Appellate Tribunal) Rules, 1963 - they are descriptive and argumentative in nature. In brief, the grievances of the assessee are of two folds, viz. (a) the ld.CIT(A) has erred in confirming the disallowance of loss in contract amounting to Rs.4.00 crores, and (b) the

ld.CIT(A)has erred in confirming disallowance of Rs.9,69,947/- which was made by the AO under section 14A of the Income Tax Act, 1961 read with rule 8D of the Income Tax Rules, 1962. First we take second fold of grievance i.e. disallowance made under section 14A r.w.s. 8D.

3. Brief facts of the case are that the assessee-company has field its return of income electronically on 30.9.2008 declaring total income at Rs.35,68,29/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) was issued and served upon the assessee on 25.9.2009. According to the AO, on perusal of balance sheet it revealed that the assessee-company had made huge investment in shares and securities. The assessee has claimed interest expenditure of Rs.11,39,180/- in its profit & loss account. The assessee has not allocated any interest expenditure towards investment. Accordingly, ld.AO has made disallowance of Rs.9,69,947/- under section 14A r.w.r. 8D of the Income Tax Rules. He made disallowance of interest expenditure at Rs.1,34,997/- and administrative expenditure at Rs.8,34,950/-.

4. Appeal to the CIT(A) did not bring any relief to the assessee. On the strength of Hon'ble Gujarat High Court decision in the case of CIT Vs. Corrtech Energy P.Ltd., 45 taxmann.com 116 (Guj), the ld.counsel for the assessee contended that if there is no exempt income claimed by the assessee, then there could not be any disallowance under section 14A of the Income Tax Act. He placed on record copy of the Hon'ble Court's decision. The ld.DR is unable to controvert to this contention of the ld.counsel for the assessee.

5. We have duly considered rival contentions and gone through the record carefully. Hon'ble High Court has held that if assessee has not made a claim

for exemption, then, section 14A could not be applied. The finding recorded by the Hon'ble Court in para-4 of reads as under:

> *"4. Counsel for the Revenue submitted that the Assessing Officer as well as CIT(Appeals) had applied formula of rule 8D of the Income Tax Rules, since this case arose after the assessment year 2009-2010. Since in the present case, we are concerned with the assessment year 2009-2010, such formula was correctly applied by the Revenue. We however, notice that sub-section(l) of section 14A provides that for the purpose of computing total income under chapter IV of the Act, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. In the present case, the tribunal has recorded the finding of fact that the assessee did not make any claim for exemption of any income from payment of tax. It was on this basis that the tribunal held that disallowance under section 14A of the Act could not be made. In the process tribunal relied on the decision of Division Bench of Punjab and Haryana High Court in case ofCITv Winsome Textile Industries Ltd. [20091 319 ITR 204 in which also the Court had observed as under : :*
>
> > *"7. We do not find any merit in this submission. The judgement of this court in Ahhishek Industries Ltd(2006) 286 ITR 1 was on the issue of allowability of interest paid on loans given to sister concerns, without interest. It was held that deduction for interest was permissible when loan was taken for business purpose and not for diverting the same to sister concern without having nexus with the business. The observations made therein have to be read in that context. In the present case, admittedly the assessee did not make any claim for exemption. In such a situation section 14A could have no application."*

The assessee has not claimed any exempt income in this year, therefore, no disallowance can be made. Respectfully following judgment of the Hon'ble Gujarat High Court cited (supra), we allow this ground of appeal, and delete the disallowance of Rs.9,69,947/-

6. In the next fold of grievance, the assessee has pleaded that it has suffered a loss in a contract which has been disallowed by the AO, and the ld.CIT(A) has confirmed such disallowance.

7. Brief facts of the case are that M/s.Jay Construction is a proprietary concern of Shri Naresh Muktilal Shah. The proprietorship concern had entered into an agreement on 26.4.2007 with Shri Bharatbhai Kothari and Shri Rajendrasingh Ravubhai Waghela i.e. owners of the land bearing survey no.695. Under this agreement, he has acquired development right of this land, admeasuring 8802 sq.meters of Village Sanand. He entered into an agreement with the assessee on 26.6.2007 in which it has been agreed that the assessee would construct 100 bungalows out of said plot of land in conformity with the plan, drawings and specifications. It has been agreed that second party i.e. the assessee would commence construction within 30 days of approval of development plan by appropriate authority, and complete construction on or before expiry of 24 months from the date of execution of the contract. Somehow the contract could not be completed. As per clause-7 of the contract, second party if abandons contract or fails to commence work then would pay a sum of Rs.4.00 cores to the first party i.e. M/s.Jay Corporation. According to the assessee, it could not get the approval from competent authority, and therefore, could not commence contract work. On 20.3.2008, the contract was cancelled, and a cancellation agreement was executed between the parties. The assessee has made payment of Rs.4 crores through account payee cheque, which has been duly credited in Jay Corporation. The assessee has claimed deduction of this amount on the ground that it has suffered loss. The claim of the assessee was disallowed by the AO. He has suspicion about the execution of such contract. The AO was of the opinion that it was a step at end of the assessee to avoid payment of tax. The AO has

narrated certain peripheral circumstances in order to bring point at home that the contract was not genuine, and devised to reduce tax liability, and there is no such activities being carried out by the assessee. Accordingly, he disallowed claim of the assessee. In appeal, it was contended by the assessee that the AO has not granted sufficient time for producing proprietor of Jay Corporation. He appeared before the AO on 23.12.2010 and affidavit to this effect was submitted before the AO. The ld.CIT(A) has called for remand report. It has been placed on paper book at page no.159 to 165. The ld.CIT(A) has gone through the record, and thereafter concur with the AO. The finding of the ld.CIT(A) reads as under:

> "*4.2 I have considered the order passed by the AO, the elaborate remand report and the counter comments by the appellant. I find that the appellant conspicuously silent on about the fact that neither they nor Shri N.M. Shah have undertaken any real estate project in the past or in future. The appellant has also not offered any convincing reasons for entering into agreement for construction of bungalows on an agricultural land when the law of land stipulates that no construction could not carried out on agricultural land, It is also notice worthy that the clause 1 of the agreement states that" the party of the 1st part is absolutely seized and possessed land of survey number / block number 695....." which is factually incorrect as this land stands in the name of other persons and there is no fact brought on the record by the appellant that how M/s Jay Construction is absolutely seized or is in possession of such land to carry out the construction of 100 bungalows. In my opinion, the inclusion of factually incorrect clause it self makes the agreement illegal. Further the appellant is conspicuously silent on certain issue relating to plan for construction viz who has applied for plan or when such plan for construction was submitted or who has applied for CLU permission (change of land use) to non-agriculture land which is basic prerequisite for submission of plan and construction thereof. No evidence to this effect is submitted before the A.O or before me to reinforce the claim that appellant indeed has taken substantial steps to plan and commence construction by appointing the SH N M shah.*

I also find that the fact of stamp paper numbers for execution of contract and cancellation of contract as being successively numbered indicating the fact that such exercise was pre-mediated one, specifically designed to book losses in the given Asst. Year. It is notice-worthy that Shri N.M. Shah is a person of no means and does not have a valid PAN nor he has filed his income-tax return to show that such receipts before Income-tax department. I am inclined to agree with the conclusion drawn by the AO in para-10 of his remand report that the appellant had only interest and income from other sources amounting to Rs.4.47 crores approximately and the appellant had devised the aforesaid exercise to reduce the taxable income by an amount of Rs.4 crores through a payment: from the entire exercise which clearly is colourable devise, a dubious method of entering into a contract and cancellation thereafter to book a bogus liability of Rs.4 corres. Considering all the above, I am of the firm view that the action taken by the AO in making for disallowance of Rs.4 crores is correct and same is therefore hereby confirmed. Ground no.4 raised by the appellant therefore is dismissed."

8. Before us, while impugning the orders of the Revenue authorities, the ld.counsel for the assessee took us through written submissions filed before the CIT(A) and available on page no.179 of the paper book. He pointed out that the AO has made reference to certain circumstantial situations available in this transaction in order to doubt the genuineness of the contract and contractual liability. He appraised us as to how this inference drawn by the AO is not sustainable in the eyes of law. We will be dealing each objection and explanation of the assessee in subsequent paras of this order.

9. The ld.DR relied upon the orders of the CIT(A) and pointed out as to how action of the AO is justifiable to ignore this contract and disallowance of the alleged loss to the assessee.

10. We have duly considered rival contentions and gone through the record carefully. Before we embark upon an inquiry on the facts and circumstance pleaded by the assessee and considered by the AO about the allowability or

disallowabilty of the claim of loss, we deem it pertinent to keep in mind certain fundamental proposition of law for appreciating such controversy. It is pertinent to observe that in order to claim expenditure under section 37(1) of the Income Tax Act, assessee requires to fulfill certain conditions viz. (a) there must be expenditure, (b) such expenditure must not be of the nature described in sections 30 to 36, (c) expenditure must not be in the nature of capital nature or personal expenditure of the assessee, and (d) expenditure must be laid out or expended wholly and exclusively for the purposes of the business or profession. The expression "wholly" employed in section 37 refers to quantification of expenditure, while, expression "exclusively" refers to motive, objects and purpose of the expenditure. The ld.counsel for the assessee has made reference to written submissions filed before the ld.CIT(A) and in those submissions, a large number of decisions have been referred by the assessee. In order to appraise ourselves with authoritative pronouncements of the Hon'ble Gujarat High Court as well as Hon'ble Delhi High Court, propounding approach requires to be adopted by adjudicating authority while appreciating claim of the assessee about the business expenditure, it is important to make reference to the decisions of the Hon'ble Gujarat High Court in the case of Voltamp Transformer Pvt. Ltd. Vs. CIT, 129 ITR 105 (Guj). The following observations of the Hon'ble Court are worth to note:

> *"So far as the questions of commercial expediency and business need of an organization are concerned, it is not the view point of a revenue officer which should count, but it should be the view of an ordinary businessman dealing with a situation like the one faced by the assessee."*

11. In a similar circumstance, the Hon'ble Delhi High Court had an occasion to examine aspect of commercial expediency considered by a businessman while incurring any expenditure. The Hon'ble Delhi High Court

has made the following observations on this aspect in the decision of the CIT Vs. Dalmia Cement Ltd., 254 ITR 377.

> *"An expenditure to which one cannot apply an empirical or subjective standard is to be judged from the point of view of a businessman and it is relevant to consider how the businessman himself treats a particular item of expenditure. The term "commercial expediency" is not a term of art. It means everything that serves to promote commerce and includes every means suitable to that end. In applying the test of commercial expediency, for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business the reasonableness of the expenditure has to be judged from the point of view of the businessman and not the Revenue (see CIT v. Walchand and Co. (P.) Ltd. ; J. K. Woollen Manufacturers v. CIT; Aluminium Corporation of India Ltd. v. CIT and CIT v. Panipat Woollen and General Mills Co. Ltd. . But it must not suffer from the vice of collusiveness or colourable devices."*

12. In the light of the above, let us examine the facts of the present case. As observed earlier, the assessee had entered into an agreement on 27.6.2007 with Jay Corporation for construction of 100 bungalows on plot of land admeasuring 8802 sq.meters. According to the assessee, it failed to fulfill the terms and conditions of this agreement, and therefore, in view of terms and conditions of agreement for making payment, damages it has paid a sum of Rs.4 crores to Jay Corporation. In support of this claim, the assessee has filed copy of the agreement dated 27.6.2007, copy of cancellation agreement dated 20.3.2006, confirmation from Jay Corporation, details of payment through account payee cheques to Jay Corporation, copy of ledger acfount of Jay Corporation in the books of the assessee has been placed on page no.123n of the paper book. Details of payments are being duly reflected in the accounts of the assessee. It has also been brought to our notice that money was not withdrawn for a substantial time from the account of Jay Corporation and it is not case of the AO that amounts were immediately withdrawn or transferred to the assessee. The ld.counsel for the assessee drew our attention towards

bank statement. In order to appreciate this documents, it is pertinent to take note of the agreement dated 27.6.2007 which is available at page no.112 of the paper book. It reads as under:

"AGREEMNT FOR CONSTRUCTION OF BUILDING

Party of the First Part : Promoter	*JAY CONSTRUCITON a Proprietorship firm through its proprietor Naresh Muktilal shah Aged 48 years, by religion Hindu, occupation business, having address at Vardhman ni Khadki, Mangal Parekh No Khancho, Shahpur Darwaja, Ahmedabad.* *Hereinafter called "Party of the First Part" or]"Promoters " which expression shall un-„ less it be repugnant to the context or meaning thereof be deemed to include its successors and assigns.*
Party of the Second Part: Contractor	*Ganesh Plantations Ltd. a company registered under Reg. No. U01119GJ1994 PLC023941 dated 21/12/94 through its au-thotized signatory Harshit Rajnikant Shah Ag4d adult, by religion Hindu, occupation service, having address at 1st Floor, Samudra Complex, Off. C.G.Rcad, Ellisbridge, Ahmedabad.* *Hereinafter called "Party of the Second Part" or "Contractor" which*

expression shall unless it be repugnant to the context or meaning thereof be deemed to include its successors and assigns.

WHEREAS,

1) The Party of the First Part is absolutely seized and possessed land of Survey No. / Block No. 695 having area admeasuring about 8802 sq. mtrs of Village Sanand of Tal. Sanand of Dist. Ahmedabad in respect to development agreement dated 26/04/2007 executed by and between the Party Of the First Part and the original owner of the said land more particularly described In the Schedule written hereunder (Hereinafter referred to as the "said Plot of Land").

2) The Party of the First Part engaged in the business of Real Estate development, Construction and Infrastructure Development. The Party of the First Part has proposed residential Bunglow Scheme (for Short "Aaditaya Bunglow") of on the said Plot of Land, The Party of the First Part wants to develop the above said Plot of Land. Party of the First Part proposed to develop said Plot of Land having area admeasuring about 8802 sq. mtrs and for that purpose Party of the First Part has offered to the Party of the Second Part to construct the above said residential bunglow scheme. Known asAaditaya Bunglow.

3) The Party of the First Part has appointed Hiren Mewada as the Architect and the said Architect has prepared the plans, drawings and elevation of the said Plot of land and the specifications of the works to be done and of the materials.

4) The Party of the Second Part engaged in the Business of the building construction and land developers has agreed to construct the said Plot of the Land.

NOW IT IS AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. The Party of the Second Part will construct the 100 bunglows out of the said Plot of the Land in conformity with the plans,

drawings, specifications and elevations prepared by the Architect with the material of best quality.

2. *The Party of the Second Part hereby undertake to commence the construction within 30 days of approval of Development Plans by appropriate authority ana1 complete the construction on or before the expiry of 24 month's from the date of execution of these presents In accordance with the plans duly approved and sanctioned by the appropriate authority.*

3. *The Party of the First Part will pay to the Party of the Second Part a sum of Rs. 20,45,72,000/- say rupees twenty crores forty five lacs seventy two thousand only as the total construction cost out of which the Party of the First Part shall pay to the Party of the Second Part such! sum as may be sufficient to defray the expenses incurred by the Party of the Second Part in respect of the work checked and certified by the qualified engineer of the Party of the First Part.*

4. *After the completion of the construction work of the intended buildings according to the contact, the Party of the second part shall have removed and cleared all scaffolding, unused material and rubbish from the land and premises at their own cost.*

5. *The Party of the First Part shall allow free ingress to and egress from the premises to the Party of the Second Part, servants, employees, sub-contractors and all other persons, who are necessary in connection with the carrying out of the works under the agreement.*

6. *The Party of the Second Part shall indemnify the Party of the First Part in respect of all claims, damages or expenses payable in consequence to any injury to any employee, workman, nominee, invitee while in or upon the said premises. The Party of the Second Part shall also be responsible for any damage to buildings, whether immediately adjacent or otherwise and any damage to buildings, whether immediately adjacent or otherwise.*
7. *If the Party of the Second Part abandon the contract or fail to commence the work or suspend the progress of the work for 30 days without any lawful excuse under these conditions, or fall to*

proceed with the works with such due diligence and fail to make such due progress as would enable the works to be completed within the time agreed upon the Party of the Second Part has to pay compensation/damages of Rs.4,00,00,000/- say rupees four crores only to the Party of the First Part and cancelled the said agreement

8. The Party of the Second Part shall be bound to appoint an engineer competent to receive instructions from the architect from time to time, on behalf of the Party of the Second Part at all reasonable hours and all directions given to him by the Architect shall be deemed to have been given to the party of the Second Part.

9. The Party of the First Part or his representative shall be entitled to inspect the progress of the construction work and materials used for the construction and they shall be entitled to point out to the architect any defects in the construction work, quality of workmanship or materials used when such defective work is in progress or being executed or such material is brought on site. If the architect is satisfied about the objections raised, the said architect shall certify the same in writing and direct the Party of the Second Part to rectify at their own cost the defect in the said construction work or remove such defective materials and the same shall be rectified or removed by the Party of the Second Part as directives.

IN WITNESS WHEREOF the patties have set and subscribed their hands and seal on the day 27 of June 2007 at Ahmedabad."

13. Contrary to the above evidence, conclusions of the AO are based on inference drawn from the circumstances. In the remand report, the ld.AO has considered it more elaborately and objectively. He formulated the following four questions:

(a) Whether there is any genuine agreement entered into with M/s. Jay Construction?

(b) Whether M/s. Jay Construction is genuine entity and has the capacity to engage a contractor like Ganesh Plantation Limited?

(c) Whether the so called agreement is enforceable under the law?
(d) If the agreement is enforceable under the law, whether the liability of compensation/ damages is accrued during the year under consideration.

14. Let us consider discussion made by the AO under each question formulated by him along with finding recorded by the ld.CIT(A) extracted supra. While appreciating the genuineness of the agreement, the ld.AO in the remand report has devoted major time about explaining nature of contract, and thereafter observed that the assessee failed to furnish evidence as to when it received approved for alleged construction of 100 bungalows as per clause (2) of the said agreement. The ld.CIT(A) has also concurred with these circumstances. But if contract is being perused, then it will be seen that it was not specifically specified that it is the responsibility of Jay Corporation to provide approved plan. In the written submissions before the ld.CIT(A), the assessee has specifically pleaded that it was the duty of the assessee to get approval and when it failed to get the approval, it realized that this contract cannot be executed. On page no.183 of the remand report in the written submissions the assessee has specifically pleaded that *"However, the appellant company could not get the approval which was the primary and first step and hence the agreement was terminated."*. Now it is to be appreciated as to how two business entities have made discussion about the development of the project. What are their obligations and how the objects would be achieved. The ld.CIT(A) has observed that the land on which the alleged bungalows are to be constructed was an agriculture land and none could commence construction on agriculture land. Similarly, the ld.CIT(A) has observed that land bearing survey no.695 was not owned by M/s.Jay Corporation. It appears that these two facts weighed in the mind of the ld.Revenue authorities to doubt claim of the assessee. Though the issue is not

directly linked with the controversy in hand, but it has some links. Section 80IB(10) was incorporated in the statute with an intention to give and encourage to provide housing units in urban and semi-urban areas, where there is an acute shortage of housing units, particularly, for middle income group citizens. To ensure that benefit reaches to the people, certain conditions were provided in sub-section (10). We have experience, based on large number of decisions, at the end of the Hon'ble Gujarat High Court that these benefits were denied to the developers on the conditions that approval was not in their names, land was not owned by them. The Hon'ble Gujarat High Court has considered an important question of law in bunch of appeals along with the case of Radhe Developers reported in 351 ITR 403. The question framed by the Hon'ble High Court reads as under:

> *"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in allowing deduction u/s.80IB(10) r.w.s. 80IB(1) to the assessee when the approval by the local authority as well as completion certificate was not granted to the assessee but to the landowner and the rights and the obligations under the said approval were not transferable, and when the transfer of dwelling units in favour of the end-users was made by the landowner and not by the assessee?"*

15. The Hon'ble High Court has ultimately held that for developing housing project, it is not necessary that the assessee to be owner of the land. Similarly, it was not necessary that approval should be in the name of assessee. If assessee has borne risk and reward of the contract, then, it will be a project of the assessee.

16. In the very contents of the contract agreement entered into with assessee and Jay Corporation it has never alleged that it was owner of the land bearing survey no.695. M/s.Jay Corporation has alleged that it is seized of

development right and possession of the land. Mutual understanding between the assessee and Jay Corporation was that the assessee would get approval and commence construction work within 30 days from the approval made, and Jay Corporation will pay a sum of Rs.20,45,72,000/- towards construction cost. If the assessee failed to get construction commenced, then it will have to pay a sum of Rs.4.00 crores as compensation/damage. The ld.CIT(A) has erred in not appreciating distinction between holding of development right alongwith possession vis-à-vis ownership of the land. It appears that in the finding extracted supra, the ld.Revenue authorities has intermingled these two different rights and made observation that claim of the first party i.e. Jay Corporation about the possession and seizure of land is factually incorrect. A person can be in possession of a land and can be having development right without there being ownership. Thus, facts have not been appreciated in right perspective by the ld.Revenue authorities.

17. The next objection raised by the Revenue authorities is about manner in which agreement was executed. According to them, it was not registered or notarized. Stamp paper for execution of the agreement and cancellation are in continuous serial number exhibiting the fact that transaction was only on paper and devised to take benefit to book the loss. This is an inference based upon an angle with which an adjudicating authority approaches the controversy. According to the assessee, it was a contract duly entered between two competent entities as per section 46 of the Companies Act, 1956, which provides a form of contract on behalf of the company. There is no lapse committed by the parties. There is no violation under the Indian Contract Act about the terms and conditions and consideration and otherwise. Now even it is not on stamp paper and executed on simple paper without any notarization, if party to the contract did not dispute it, how this contract can be

ignored ? The ld.AO cannot doubt a contract on the basis of its formation. The ld.CIT(A) has also raised issues regarding who has applied for change of land user certificate; who has applied for plan etc. No doubt the contract does not spell this aspect. It talks about plan required to be prepared by an architect.

18. Next objection given by the AO is that Shri N.M. Shah could not appear before him for examination. It is pertinent to note that notice under section 143(2) was issued upon the assessee on 25.9.2009 vide which an opportunity was given to submit any details in support of return. Assessment proceedings remained dormant upto June, 2010 when incumbent in the seat of the AO changed and new incumbent came. He again issued noticed under section 143(2). Proceedings have started and the assessee has submitted certain details on 12.7.2010. With regard to the present issue, the AO had raised specific query vide letter dated 5.10.2010. He completed the assessment on 22.12.2010. During this period, he issued a notice to the proprietor of Jay Corporation and summons under section 131 of the Income Tax Act. The proprietor has alleged that he could not appear on 22.12.2010 on account of his pre-occupation and not keeping good health, but he appeared on 23.12.2000 and the AO refused to examine him. His affidavit dated 23.12.2010 has been placed on record along with the letter written to AO. The affidavit reads as under:

"AFFIDAVIT

I, Naresh Muktilal Shah, aged about 51 years, Hindu by religion, occupation Business and having address at Vardhman ni Khadki, Mangal Parekh no Khancho, Shahpur Darwaja, Ahmedabad-380001 do hereby state on oath that -

1) I am a proprietor of a firm known as Jay Construction.

2) My firm has entered into an agreement for construction of building in the year 2007 with a Company known as Ganesh Plantations Ltd

having its registered office at 1st floor, Samudra Complex, Off:C.G.Road, Ahmedabad.

3) The said Company could not start the construction and therefore in 2008 we entered into an agreement for cancellation of the earlier agreement.

4) There was a scrutiny assessment of Ganesh Plantations Ltd for the Assessment Year 2008-09 under Income Tax Act 1961. The said transactions were scrutined by the assessing officer Mr. R.R.Nair, Income Tax Officer, Ward 4(1), Ahmedabad. From my behalf I submitted two written submissions.

5) However the assessing officer issued a notice u/s 133(6) of the I.T. Act 1961 and directed me to appear before him in November/December 2010. Due to several reasons like my travelling and illness I could not appear before the assessing officer. However every time through my authorized representative I obtained an adjournment.

6) Subsequently Ganesh Plantations Ltd were directed by the assessing officer to produce me for my statement. The last date given was 22nd December,2010. Due to my illness, I could not appear before the assessing officer.

7) However I appeared before him on 23rd December 2010. But the assessing officer refused to take my statement. I hereby state and confirm that I am available for any type of questioning if required by the assessing officer.

For, Jay Construction

Stated on oath.

Proprietor
Sd/-
(NARESH MUKTILAL SHAH)

Place: Ahmedabad Date :23-12-2010.

19. On an analysis of these details, we are of the view that though the ld.AO has posed certain questions about duty of parties to the agreement for getting approval from competent authority for constructions of the bungalows, these are peripheral circumstances which has created a suspicion, but we have

to appreciate what would have operated in the minds of two businessmen exploring possibilities of business while entering into transaction. The approach of the Revenue authorities is such that every business venture would only give profit. With this angle, if a transaction is being appreciated, then the circumstances and questions would only give rise to suspicion. On the other hand, stand of the assessee as a businessman is that in such type of projects where everything was depending on getting approval from the Government nothing concrete could be anticipated. To our mind, it is only difference of opinion in appreciating a transaction. After looking into the explanation of the assessee with all other attending circumstances, we are of the view that the assessee had entered into an agreement which was a business venture and suffered loss. It has made payment of contractual liability. Money has been paid through account payee cheque and it did not return to the assessee as pointed out by the ld.counsel for the assessee. In such situation, the AO was not justified to disallow claim of the assessee. We allow grounds of appeal of the assessee and delete the disallowance.

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

Order pronounced in the Court on 6th December, 2016 at Ahmedabad.

Sd/-	**Sd/-**
(MANISH BORAD)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 06/12/2016