

आयकर अपीलिय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

**BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
 AND
 SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER**

आयकर अपील सं. / ITA Nos.1869 & 2286/PUN/2017
निर्धारण वर्ष / Assessment Years : 2011-12 & 2012-13

Dy. Commissioner of Income Tax,
 Circle – 8, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Kishor Shankar Garve,
 Garve Building, Navi Sangvi,
 Pune – 411027

PAN : AAVPG2791H

.....प्रत्यर्थी / Respondent

Assessee by : Shri V.L. Jain

Revenue by : S/Shri J.P. Chandraker & M.G. Jasnani

सुनवाई की तारीख / Date of Hearing : 07-04-2022

घोषणा की तारीख / Date of Pronouncement : 05-07-2022

आदेश / ORDER

PER S.S. VISWANETHRA RAVI, JM :

These two appeals by the Revenue against the separate order dated 28-02-2017 and 03-07-2017 passed by the Commissioner of Income Tax (Appeals)-3, Pune [‘CIT(A)'] for assessment years 2011-12 and 2012-13, respectively.

2. Since, the issues raised in both the appeals are similar basing on the same identical facts. Therefore, with the consent of both the parties, we

proceed to hear both the appeals together and to pass a consolidated order for the sake of convenience.

3. First, we shall take up appeal in ITA No.1869/PUN/2017 for A.Y. 2011-12 of Revenue.

4. The appellant-revenue raised following grounds of appeal :

- “1) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the deduction u/s. 80IB(10) of the Income Tax Act of Rs.3,85,54,219/- by ignoring the fact that commencement certificate was obtained first time on 31.03.2005.*
- 2) *On the facts and circumstances of the case and in law, the Ld. CIT(A) did not take cognizance of the fact that assessee himself revised his return of income, withdrawing his claim of deduction u/s. 80IB and did not press his claim during assessment proceedings. The CIT(A) did not give opportunity to the AO, when assessee claimed deduction u/s. 80IB, first time before the CIT(A).”*

5. The brief facts of the case are that the assessee is an individual engaged in the business of civil contractor and builder. The assessee is also a Director in M/s. Garve Motors Pvt. Ltd. The return of income for A.Y. 2011-12 was e-filed on 26-09-2011 declaring total income at Rs.64,85,567/- after claiming the exemption of the profits derived from housing project namely Treasure and Emerald Palace, under provisions of section 80IB(10) of the Income Tax Act. Subsequently, survey operations under the provisions of section 133A were conducted in the business premises of the respondent-assessee on 15-02-2013. During the course of survey operations, statement was recorded from the assessee, wherein the assessee had withdrawn claim of exemption of profits u/s. 80IB(10) of the Act of Rs.3,85,54,219/-. Consequent to the statement given during the course of survey proceedings, the assessee had filed revised return of

income for A.Y. 2011-12 on 21-03-2013 declaring a total income of Rs.4,50,39,787/- wherein the assessee had withdrawn the claim for exemption of income u/s. 80IB(10) of the Act of Rs.3,85,54,219/-. Subsequently, the AO issued notice u/s. 148 of the Act on 07-05-2013 calling upon the assessee to file return of income, as income escaped assessment. In response to notice u/s. 148 of the Act, the assessee filed letter stating that the revised return of income filed on 21-03-2013 should be treated as return in response to notice u/s. 148 of the Act.

6. Subsequently, after issue of notice u/s. 143(2) of the Act, the assessment was completed by the AO vide order dated 06-12-2013 passed u/s. 143(3) r.w.s. 147 of the Act accepting returned income of Rs.4,50,39,787/-.

7. On receipt of the assessment order, the assessee feeling aggrieved, filed an appeal before the Ld. CIT(A) contending that the AO should have allowed the exemption of profits derived from housing project u/s. 80IB(10) of the Act. The AO had exercised coercion against the assessee to file revised return withdrawing the claim of deduction of profits derived from housing project u/s. 80IB(10) of the Act. The Ld. CIT(A) had allowed the claim by holding that though the assessee had filed revised return withdrawing the claim for deduction of profits u/s. 80IB(10) of the Act after survey operation u/s. 133A of the Act, by holding that though the claim was not made in return of income, can be allowed by the CIT(A), also adjudicated on the merits of allowability of deduction u/s. 80IB(10) of the Act and accordingly, allowed the appeal filed by the assessee. Being aggrieved by the decision of Ld. CIT(A), Revenue is in preset appeal.

8. The ld. DR submits that the Ld. CIT(A) had travelled beyond the jurisdiction in allowing the appeal of assessee by holding that the claim for deduction of profits u/s. 80IB(10) of the Act can be allowed, even though not made in the return of income. He further submits that the assessee had no grievance, since returned income had been accepted by the AO and no fresh claim can be entertained by the CIT(A), which had not undergone of the process of assessment by the AO. The ld. DR further submits that the assessee had preferred an appeal before the CIT(A) after the penalty proceedings initiated u/s. 271(1)(c) of the Act were dropped which clearly demonstrate that the assessee is not entitled for deduction u/s. 80IB(10) of the Act, for having not completed the project within stipulated period.

9. On the other hand, the Ld. AR for the assessee submits that during the course of survey operation, the assessee was pressurized by the AO to withdraw the claim for deduction of profits u/s. 80IB(10) of the Act and there is no bar for the CIT(A) to entertain the new claim, in support of this proposition he had placed reliance in the case of CIT Vs. Pruthvi Brokers and Shareholders (P) Ltd. reported in 349 ITR 336 (Bom.). On merits he submits that the construction of Plot A was completed completion certificate was obtained on 31-03-2009 and construction of Plot B was completed and completion certificate was obtained on 31-03-2012 and the assessee was clearly entitled to claim deduction u/s. 80IB(10) of the Act.

10. Heard the rival submissions and perused the material on record. The issue in the present grounds of appeal relates to allowability of deduction on profits u/s. 80IB(10) of the Act which was withdrawn by the assessee himself in revised return of income. The contention of assessee is

that claim for deduction u/s. 80IB(10) of the Act was withdrawn by the assessee on the pressure exercised by the AO during the course of survey proceedings cannot be accepted in the absence of any evidence on record. No material was placed before us showing that any complaints were lodged against the AO before the higher officials.

11. The provisions u/s. 80IB provides for a deduction of profits held from the eligible housing project subject to the conditions stipulated therein. The provision of sub-section (5) of section 80A provides that where an assessee fails to make a claim in the return of income, for any deduction under the provisions of Chapter VIA, no deduction shall be allowed. Admittedly, in the present case in the original return of income filed by the assessee, made a claim for deduction of profits under the provisions of section 80IB(10) of the Act. The claim was withdrawn in the revised return of income. Once, the revised return is filed, the original return of income must be taken to be withdrawn and substituted by the revised return. In this connection reliance can be placed on the decision of Hon'ble High Court of Allahabad in the case of Dhampur Sugar Mills Ltd. Vs. CIT reported in 90 ITR 236 (Allahabad), Hon'ble High Court of Gujarat in the case of Kunal Structure (India) Pvt. Ltd. Vs. Dy. CIT reported in 422 ITR 482 (Gujarat) and the Hon'ble High Court of Bombay in the case of Atul Projects India Pvt. Ltd. Vs. UOI reported in 422 ITR 478 (Bombay). If we are, to accept the contention of assessee that the revised return was not filed on account of any omissions found in the original return, it should be construed to mean that the revised return was filed to cure defects in the original return of income, revised return would relate back to the original filing date, which means that the assessee had not made any claim in the

return of income for deduction of profits u/s. 80IB(10) of the Act read with the provisions of sub-section (5) of section 80A of the Act.

12. Further, the claim had not undergone the process of assessment by the AO, therefore, such claims cannot be allowed by the CIT(A) for the first time in contravention of plain provisions of sub-section (5) of section 80IA of the Act and there is nothing on record to indicate that the CIT(A) had satisfied himself as to the satisfaction of conditions necessary for allowing the benefit u/s. 80IB(10) of the Act. Further, the CIT(A) failed to refer to material on record, if any, that the assessee is entitled to benefit of deduction u/s. 80IB(10) of the Act and in any event the direction of CIT(A) allowing the benefit u/s. 80IB(10) of the Act is contrary to plain provisions of sub-section (5) of section 80A of the Act. Thus, the order of CIT(A) is illegal and perverse, cannot be sustained in the eyes of law, hence, reversed and the order of AO is restored. Thus, grounds raised by the Revenue are allowed.

13. In the result, the appeal of Revenue is allowed.

14. Now, we shall take up appeal in ITA No. 2286/PUN/2017 for A.Y. 2012-13 of Revenue.

15. The brief facts of the case are that the assessee is an individual engaged in the business of civil contractor and builder. The assessee is also a Director in M/s. Garve Motors Pvt. Ltd. The assessee carried on a residential project under the name Treasure and Emerald Palace. The assessee filed return of income declaring a total income of Rs.1,91,42,440/- on 25-09-2012. A survey was conducted at the business

premises of the assessee u/s. 133A of the Act on 15-02-2013. During the course of said survey, on oath the assessee offered Rs.21,37,73,109/- as additional income over and above the returned income for A.Ys. 2011-12 and 2012-13 on account of withdrawal of deduction u/s. 80IB(10) of the Act. Thereafter, the assessee filed revised return of income for A.Y. 2012-13 declaring a total income of Rs.19,44,61,330/-. The AO issued notice u/s. 143(2) of the Act. According to the AO, the assessee got commencement certificate for Plot A and Plot B on 30-03-2007 and Plot B completed by the assessee on 31-03-2012 which is beyond the permissible time limit i.e. 31-03-2009. The AO further held that the assessee withdrew deduction u/s. 80IB(10) of the Act after the survey and determined the total income of the assessee at Rs.19,43,61,330/- vide its order dated 06-12-2013. Before the CIT(A), the assessee raised a ground on the fact and law questioning the AO is not justified to press the appellant to file revised return of income and asked to declare additional income of Rs.17,52,18,890/-. Thereafter, vide letter dated 29-01-2015 the assessee modified grounds as "The learned AO erred on facts and in law in not allowing the claim of deduction of Rs.17,52,18,890/- u/s. 80IB(10) of the Income Tax Act, 1961." The CIT(A) considering the same did not agree with the assessee and confirmed the order of AO by holding it was not error of omission but an error of meaningful commission vide its order dated 27-07-2016. Thereafter, an application u/s. 154 of the Act filed by the assessee before the CIT(A)-3, Pune. The submissions of which the CIT(A) reproduced in Para No. 2 in the impugned order. The CIT(A) in 154 proceedings held that the assessee is eligible for benefit u/s. 80IB(10) of the Act and accordingly directed the AO to compute eligible deduction u/s. 80IB(10) of the Act vide its order dated 03-07-2017. The appellant-

revenue, having aggrieved by the order of CIT(A) passed u/s. 154 of the Act in allowing deduction u/s. 80IB(10) of the Act raised following grounds of appeal which are as under :

“1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is justified in allowing the rectification application filed by assessee while holding that there is a mistake apparent from record when on similar facts the predecessor Ld. CIT(A) has adjudicated and rejected the plea of the assessee to admit additional evidence?”

2. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in allowing the deduction u/s. 80IB(10) of the I.T. Act of Rs.3,85,54,219/- by ignoring the fact that commencement certificate was obtained first time on 31/03/2005?”

3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) did not take cognizance of the fact that assessee himself revised his return of income, withdrawing his claim of deduction u/s. 80IB(10) and did not press his claim during assessment proceedings. The Ld. CIT(A) did not tie opportunity to the AO, when assessee claimed deduction u/s. 80IB, first time before the Ld. CIT(A)?”

16. Heard the rival submissions and perused the material on record. The issue in the present appeal is whether the CIT(A) was justified or not in allowing deduction on profits earned from housing project u/s. 80IB(10) of the Act in exercise of powers vested with him under the provisions of section 154 of the Act. Admittedly, the assessee withdrawn the claim for deduction of profits from housing project of Rs.17,52,18,890/- u/s. 80IB of the Income Tax Act by filing revised return of income consequent to the survey operations a statement given during the course of survey operations. The AO had accepted the returned income.

17. Aggrieved by the order of assessment, the assessee filed an appeal before the CIT(A) contending that the AO ought not to have exercised coercion to withdraw the claim u/s. 80IB(10) of the Act and ought to have allowed the deduction u/s. 80IB(10) of the Act. The CIT(A) had dismissed

the appeal without admitting the additional evidence by holding that there is no evidence on record that the AO had pressurized the assessee to withdraw the claim for deduction u/s. 80IB(10) of the Act vide order dated 06-12-2013. On receipt of the order of CIT(A) the assessee filed 154 petition citing that the CIT(A) ought not to have dismissed the appeal without admitting the additional evidence and placed reliance on the several judicial precedents considering his submissions made by the CIT(A) allowed the claim by following his order in assessee's own case for A.Y. 201-12.

18. Therefore, the question that is required to be decided by us is whether the ld. CIT(A) is justified in allowing the claim for deduction u/s. 80IB(10) of the Act. Admittedly, the claim for deduction of profits u/s. 80IB(10) of the Act with withdrawn in the revised return of income. Needless to mention that once, the revised return of income is filed, the original return of income must be taken to be withdrawn and substituted by the revised return. In this connection reliance can be placed on the decision of Hon'ble High Court of Allahabad in the case of Dhampur Sugar Mills Ltd. Vs. CIT reported in 90 ITR 236 (Allahabad), Hon'ble High Court of Gujarat in the case of Kunal Structure (India) Pvt. Ltd. Vs. Dy. CIT reported in 422 ITR 482 (Gujarat) and the Hon'ble High Court of Bombay in the case of Atul Projects India Pvt. Ltd. Vs. UOI reported in 422 ITR 478 (Bombay). If we are, to accept the contention of assessee that the revised return was not filed on account of any omissions found in the original return, it should be construed to mean that the revised return was filed to cure defects in the original return of income, revised return would relate back to the original filing date, which means that the assessee had not

made any claim in the return of income for deduction of profits u/s. 80IB(10) of the Act read with the provisions of sub-section (5) of section 80A of the Act.

19. Further, we notice that the claim for deduction u/s. 80IB(10) of the Act can be made only subject to fulfillment of condition precedents. In the present case, the AO had no occasion to examine the claim of appellant for deduction u/s. 80IB(10) of the Act. There is nothing on record to indicate that the CIT(A) had satisfied himself as to the fulfillment of conditions for allowing the benefit u/s. 80IB(10) of the Act nor the CIT(A) had referred any material on record indicating that the assessee is entitled for the benefit of deduction u/s. 80IB(10) of the Act. Furthermore, the deduction under the provisions of section 80IB(10) can be allowed subject to condition that the assessee makes a claim in the return of income as provided by the provisions of sub-section (5) of section 80A of the Act. There was no claim made by the assessee for deduction u/s. 80IB(10) of the Act in the original return of income. Thus, the order of CIT(A) in allowing benefit of deduction is plainly contrary to the provisions of Income Tax Act. The CIT(A) ought not to have exercised his jurisdiction u/s. 154 of the Act, in as much as, there is no mistake apparent on record in the order of CIT(A). It is settled position of law that the CIT(A) does not have power to review his own order in the absence of any express power granted by the statute. The power conferred u/s. 154 is a limited power, conferred with a view to correcting those mistakes which are apparent from the record. The CIT(A) had not pointed out the mistakes in the original order passed by him and without referring to any mistakes apparent from the record, the CIT(A) had merely reviewed his own order in the garb of

exercising power of rectification, which is not permissible under the law. Thus, the CIT(A) had grossly erred in both exercising the power of rectification as well as allowing the benefit of deduction u/s. 80IB(10) of the Act on merits. Thus, we set aside the order of CIT(A) and the order of AO is restored. Thus, grounds raised by the Revenue are allowed.

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

21. To sum up, both the appeals of Revenue are allowed.

Order pronounced in the open court on 05th July, 2022.

Sd/-
(Inturi Rama Rao)
ACCOUNTANT MEMBER

Sd/-
(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 05th July, 2022.
रवि

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-3, Pune
4. The Pr. CIT-2, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune