

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

**ITA Nos. 813 & 987/Ahd/2017
Assessment Year: 2013-14**

M/s.Gujarat Infrapipes Pvt. Ltd. Plot No.89, GIDC Estate POR, Ramangamdi Vadodara - 391 243 PAN: AABCG 0795 J	Vs.	The Dy.CIT, Circle(1)(1), Vadodara
The Dy.CIT, Circle(1)(1), Vadodara (Appellant)	Vs.	M/s.Gujarat Infrapipes Pvt. Ltd. Plot No.89, GIDC Estate POR, Ramangamdi Vadodara - 391 243 PAN: AABCG 0795 J (Respondent)

Assessee by :	Shri M.K. Patel, AR
Revenue by :	Shri Kamlesh Makwana, CIT-DR and Shri Ashok Kumar Suthar, Sr.DR

Date of Hearing: 18.03.2024
Date of Pronouncement: 03.04.2024

आदेश/ORDER

PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER

These cross-appeals are filed by the Assessee and the Revenue as against the appellate order dated 02.01.2017 passed by the Commissioner of Income-tax (Appeals)-1,Vadodara [“CIT(A)” for short] dated 02.01.2017, arising out of assessment order dated 31.12.2015 passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) relating to the Assessment Year (AY) 2013-14. For the sake of convenience, these appeals were

heard together and are being disposed of by way of this consolidated order.

2. The brief facts of the case are that the assessee is a company engaged in the business of manufacturing of pipe fittings. The assessee-company filed its e-Return of Income on 29.09.2013 declaring total loss of Rs.2,64,74,150/- and book loss of Rs.(-)3,50,86,844/-. Assessee's Return was selected for scrutiny and assessment order was passed u/s. 143(3) of the Act on 31.12.2015 by making the following additions and disallowances:

<i>(i) Disallowance u/s. 43B of the Act</i>	19,40,232/-
<i>(ii) Prior Period Expenses</i>	91,956/-
<i>(iii) Prior Period Income</i>	91,956/-
<i>(iv) Non Deduction of TDS on International Transaction</i>	54,000/-
<i>(v) Disallowance u/s. 50C of the Act</i>	6,71,29,538/-
<i>(vi) Disallowance on account of Excess Depreciation Claimed on Software Licenses</i>	4,58,137/-
<i>(vii) Capitalization of Interest on Capital Work in Progress</i>	47,37,168/-
<i>(viii) Disallowance u/s. 40A(3) of the Act</i>	60,517/-

2.1. Thus, the Assessing Officer determined the total income of the assessee as Rs.7,45,63,504/- as against the returned loss and demanded tax thereon.

3. Aggrieved against the assessment order, the assessee filed an appeal before Ld. CIT(A), who partly allowed the assessee's appeal and partly confirmed the additions. Aggrieved against the appellate order, both the Assessee and Revenue are in appeal(s) before us.

4. The Grounds of Appeal raised by the Assessee in ITA No. 813/Ahd/2017 are as follows:

1. *On the facts and in law learned CIT(A)-1 has erred in sustaining disallowance under section 43B amounting to ₹19,40,232/- made by the Assessing Officer.*
2. *On the facts and in law learned CIT(A)-1 has further erred in sustaining addition of ₹91,956/- made by the Assessing Officer for prior period expenses.*
3. *On the facts and in law learned CIT(A)-1 has further erred in sustaining addition of ₹91,956/- made by the Assessing Officer for prior period expenses.*
4. *On the facts and in law learned CIT(A)-1 has further erred in sustaining addition of ₹54,000/- made by the Assessing Officer alleging non deduction of TDS on international transaction.*
5. *On the facts and in law learned CIT(A)-1 has further erred in sustaining assumed disallowance of interest amounting to ₹47,37,168/- as capital expenditure by the Assessing Officer.*
6. *On the facts and in law learned CIT(A)-1 has further erred in sustaining disallowance of ₹60,517/- made by the assessing officer under section 40A(3) of the Income Tax Act, 1961.*
7. *The above grounds of appeal are without prejudice to one another and the Appellant crave leave to add, to alter and / or amend any of the foregoing grounds and to make new or additional submissions at the hearing of the appeal as well as to submit fresh documents and information as advised.*

5. **Ground No.1:** The issue of disallowance on account of late payment of employees' contribution to PF under section 43B of the Act is covered in favour of Department by the Judgment of the Hon'ble Supreme Court in the case of M/s. Checkmate Services (P) Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC), following the same, this ground is dismissed.

6. **Ground Nos.2 to 3** are relating to disallowance on account of prior period expenses of Rs.91,956/-. The AR placed on record the unreported judgment of the Hon'ble Jurisdictional High Court in case of PCIT-1 Vs. Adani Enterprises Ltd. (in Tax Appeal No.566 of 2016 order dated 20.07.2016). **Ground No. 4** is relating to non-deduction of TDS on International Transaction of Rs.54,000/- and

Ground No. 6 is relating to disallowance of Rs.60,517/- u/s. 40A(3) of the Act. Since the amounts involved in all these issues are very small, the same are dismissed without going into the merits of the case, for which the Ld. Counsel for the assessee has no objection. Thus the above Grounds No. 2 to 4 and Ground No. 6 are hereby dismissed.

7. **Ground No.5:** The Ld.CIT(A) has erred in sustaining disallowance of interest amounting to ₹47,37,168 as capital expenditure by the Assessing Officer. During the course of the assessment proceedings, the Assessing Officer capitalised the interest at the rate of 12% on closing balance of CWIP in the absence of exact computation provided by the assessee and this disallowance is confirmed by the Ld. CIT(A).

7.1. Before us, the Ld.Counsel for the assessee Mr. M.K. Patel explained that the assessee has sufficient interest-free funds in the form of share capital, reserves and surplus. He also placed on record the relevant pages of audited financial statements reflecting shareholder's funds. He also relied on the Co-ordinate Bench decision in the case of DCIT Vs. IRM Offshore and Marine Engineers P Ltd. reported in (2023) 157 Taxmann 171, which is to the effect that once substantial interest-free funds are available with the assessee, no disallowance is called for under section 36(1)(iii) of the Act.

7.2. Per contra, Ld. Sr. DR Shri Ashok Kumar Suthar appearing for the Revenue supported the order passed by the lower authorities and pleaded to uphold the same.

8. We have heard the rival contentions and perused the relevant material available of the records. The Reserves and Surplus as on

31st March, 2013 are Rs.37.04 Cr as against that of Rs.39.68 Cr in addition to the share of Rs.3.22 Cr. It is also observed that the addition to the capital work-in-progress is only Rs.3.33 Cr, which is much lower than the available free funds in the form of Reserves and Surplus. The AO has worked out the disallowance based on the closing balance of CWIP at the rate of 12%. While doing so, the AO has ignored the availability of own funds and wrongly assumed that the addition to CWIP was entirely out of borrowed funds.

8.1 Therefore, in view of the wrong application of facts by the Ld.AO and judicial precedents on the above subject, we find no merit in the order of Ld.CIT(A) in confirming the addition under section 36(1)(iii) of the Act and we hereby delete the same. In the result, Ground No.5 of the appeal is allowed.

9. In the result, the appeal filed by the assessee is partly allowed.

10. Now, we take up **ITA No. 987/Ahd/2017** (Department's appeal). The Grounds of Appeal raised by the Revenue are as follows:

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT (Appeals) erred in deleting the addition made by invoking section 50C of the Act, without appreciating the fact that the transfer of property act talks about life of donor and donee under gift, and the same can only be talked about living persons. Here the company is only an artificial juridical person and not a living person, for the purpose of gift and section 47(iii) of the Act.*
2. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the depreciation claimed on software license, without appreciating the fact that the assessee had not purchased any software, only license to use it was purchased by the assessee company, thereby contravening the provisions of Appendix-I of IT Rules 1962.*
3. *The appellant craves leave to add to, amend or alter the above grounds as may be deemed necessary.*

11. **Ground No.1** relates to addition of Rs.6,71,29,538/- in view of the Provisions of section 50C of the Act on the Gift of Plots. On 12.06.2009 the assessee-company acquired from Collector, Vadodara Nine plots of land admeasuring 27,720 sq.mtrs. for Rs.57,78,511 for industrial purpose. Due to various financial, administrative and infrastructural problems, the assessee were not able to start their proposed "Industrial Project" on the above plots. Therefore, after obtaining necessary approvals from Competent Authority, the above plots were gifted to M/s.Ratnakar Estate Developers Pvt. Ltd. "free from all encumbrances and without any consideration, either in cash on hand" by executing Gift Deed dated 29.10.2012.

11.1. The Assessing Officer issued a show cause notice to the assessee to explain as to how the gift by one company to other company can be genuine, considering the fact that the company is an Artificial Judicial Person and the element of "natural love and affection" cannot be exist and why not to invoke the provisions of section 50C of the Act for the above Gift transaction.

11.2. In response, the assessee referred section 122 of the Transfer of Property Act and claimed that there is no restriction that the gift can be made only between natural person out of 'love and affection'. Further, clause (iii) of section 47 of the Act, specifically excludes any transfer of a capital asset under a Gift from the ambit of Transfer. Therefore no such addition can be made by invoking provisions of section 50C of the Act. The explanation of the assessee was not accepted by the Assessing Officer and applying section 50C of the Act, made an addition of Rs.6,71,29,538 (being Rs.7,65,07,200 the market value minus Rs.93,77,662 being indirect cost of the plots) and demanded tax thereon.

12. Aggrieved against the above addition, the assessee filed an appeal before Ld. CIT(A), who deleted the addition made by the Assessing Officer by observing as follows:

“7.3. I have considered the appellant's submission and AO's observations. As can be seen from the assessment order and the appellant's submission, the appellant had acquired plots of land for aggregate consideration of Rs.59,78,511/- on 12/06/2009. These plots were gifted by the appellant company vide Deed of Gift dated 29/10/2012 to M/s. Ratnaakar Estate Developer Pvt. Ltd. The appellant has gifted the property without any consideration, either in cash or kind. Accordingly, the cost of acquisition was debited by the appellant in its P & L a/c as exceptional item. The same was added back to its total income while computing its taxable Income in the return of income filed for AY.2013-14. The gifted land has been registered and for the purpose of payment of stamp duty, the market value of the land was adopted at Rs.7,65,07,200/-. When asked by the AD as to why the market value as determined for stamp duty valuation should not be adopted as the consideration for transfer of the land as per the provisions of sec.50C of the Act, the appellant had claimed that since the land was gifted by it, hence no transfer as per the provisions of sec.2(47) of the I.T.Act r.w. clause (iii) of sec.47 of the I.T.Act had taken place and hence sec.50C was not applicable in this case. The appellant has also relied upon decisions in the case of Nandatur Holdings & Investments Pvt. Ltd (supra) and DP World Pvt. Ltd (supra) to the effect that a corporate entity can also make a gift. The AO did not accept the contention by stating that a gift can be made only by living person and not by the appellant company which was artificial juridical person. He also stated that on account of the fact that appellant is not living person, element of natural love and natural affection cannot be said to exist in the case of company. Accordingly he adopted the market value determined for the purposes of stamp duty valuation as consideration for transfer of land and made addition as per the provisions of sec. 50C of the Act.

7.3.1. During the course of the appellate proceedings, the appellant has again reiterated the facts as mentioned before the AO. The appellant has also submitted that as per Clause 53 of objects incidental or ancillary to the main objects of the Memorandum of Association, the appellant is competent to alienate, transfer, gift, donate, settle any property of the company with or without consideration to any person. The appellant has also relied upon the decisions in the case of Redington (India) Ltd (supra) and KDA Enterprises Pvt. Ltd. (Supra) besides the decision relied upon by it before the AO. A perusal of the judicial pronouncement relied upon by the appellant shows that the High Courts as well as Benches of ITAT have held that a company is capable of making a gift if it is authorized to do so by its Memorandum of Association. Thus, the AO's claim that the appellant was an artificial juridical person and hence, cannot make a gift is not correct in view of these judicial pronouncements. Once the appellant company is held to be capable of making a gift, such gift made will not amount to transfer of gifted property as per Clause (iii) of sec.47 of the I.T.Act, 1961. Consequently, the provisions of sec.50C of the Act will not be applicable to such transaction.

13. Ld. CIT-DR Shri Kamlesh Makwana appearing for the Revenue submitted that the Ld. CIT(A) erred in deleting the addition made by the Assessing Officer without appreciating the fact that the Transfer of Property Act talks about life of a Donor and Donee under gift which will be related to a "living person" not an "artificial judicial person" namely a Company. Therefore pleaded the addition made by the Assessing Officer is to be restored.

14. Per contra Shri M.K. Patel appearing for the assessee reiterated the arguments made before the Ld. CIT(A) and also relied upon the following case laws:

(a) DP World (P) Ltd. vs. DCIT (2014) 162 TTJ 0446 :(2014) 103 DTR 0166 (Mum.Trib.) wherein it is held as follows:

"[1] The definition given u/s 122 of the TPA has to be accepted, meaning thereby that meaning of gift reflect non- element of love and affection. Therefore, gift of shares of an Indian Company by a foreign company without consideration has to be treated as gift within the meaning of Sec. 47(iii) of the Act."

(b) Redington (India) Ltd. vs. Jt.CIT (2014) 40 CCH 0527 (Chen. Trib) wherein it is held as follows:

*"Gift is definitely a transfer of property. The mother law governing the subject matter of transfer of property is Transfer of Property Act, 1882. Section 5 of the Transfer of Property Act, 1882, defines the term "transfer of property", as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and to transfer property is to perform such act. This is the master definition of "transfer of property". Other forms of transfers like gift are subject to this master provision. **The law provides in the same section 5 of the TP Act, 1882 that "living person" includes a company or association or body of individuals, whether incorporated or not. Thus, TP Act, 1882 considers a company not only as a person but literally speaking as a "living person"; a person with life. The same expression "person" provided in section 5 is transplanted in section 122 of the TP Act, which defines a "gift". "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without***

consideration by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee. When the provisions of law contained in sections 5 & 122 of the TP Act read together, it emerges that a company being a living person can transfer property by way of gift. (Para 72)

As per section 122 of the TP Act, 1882 the following are the ingredients of a gift valid in law: Transfer of existing movable or immovable property, Transfer made voluntarily, without consideration, by donor to the donee, accepted by the donee. (Para 73)

The essential ingredients of a valid gift are the existence of the property, voluntary nature of the transfer and absence of consideration. **As a pre-condition for making a valid gift, the law does not prescribe any attributes like "love and affection". (Para 74)**

Transfer of property as the general law contemplates is the transfer of both existing property and future property. But in a gift, the transfer must be of an existing property. The meaning given to the expression "gift" in the erstwhile Gift Tax Act, 1958 is the same. A gift is defined in the said Act in section 2(xii), as the transfer by one person to another person of any existing movable or immovable property made voluntarily and without consideration in money or money's worth. The "gift" for the purpose of Gift Tax Act, 1958, is further qualified, as a property in money or monies worth. **Section 2(xviii) of the Gift Tax Act, 1958 defines a person which includes a company, as well. In the Gift Tax Act also, there is no attributes like "love and affection". (Para 75)**

(c) DCIT vs. KDA Enterprises Pvt.Ltd. (2015) 171 TTJ 0001(Mumbai), wherein it is held as follows:

“ Coming to the first aspect of taxability Tax Act, 1958, is repealed in 1998, **there was no tax on gifts either on the donor or on the donee in any form under the Income Tax Act or any other Act.** It is only with the amendment of section 56 w.e.f. 1/4/05 by Finance (No.2) Act, 2004, by introducing clause (v) in sub-section 2 of section 56 that **receipt of gifts by an individual and HUF became taxable in the hands of the donee**, whereas, gifts received by any other person remained out of tax net. Whereas, with the introduction of clause (viiia) and (viiib) in sub-section 2 of section 56 w.e.f. 1/6/2010 and 1/4/2013 respectively, **gift of only shares of certain category of companies by certain category of companies have become taxable and any other gift received by any company through any other mode, i.e. cash, cheque, listed shares or other kind of properties, other than the said certain**

category of shares is not taxable till date, under any provisions of the Income Tax Act. Even the legislative history shows that gifts received by companies other than certain kind of shares by certain category of companies mentioned under section 56(2)(vii-a) and (vii-b) are not taxable under Income-tax Act or any other Act. During the period, when Gift Tax Act was in existence, gifts by companies as well as by any other person were taxable under the Gift Tax Act only and there was no provision for taxing it under the Income-tax Act. Therefore, gifts were not separately taxed under any provisions of the Income- tax Act during the period when the Gift Tax Act was in existence and the question of taxing the gifts separately under Income- tax Act, did not arise. When the Gift Tax Act was repealed in 1998, legislature indicated its intention that the gifts will be no more taxable under the Gift Tax Act, but no corresponding change was made under the Income tax Act and, therefore, taxability of gift remained outside the tax net for a long time until section 56(2) was amended for bringing tax on gifts received by individuals and HUFs with certain conditions with effect from 01.04.2005. Therefore, legislature again indicated its intention that certain gifts received by individuals and HUFs only will be taxed under the Income-tax, in the hands of the recipient, but gifts received by companies or any other person other than individuals and HUFs were not brought under the tax net. With the passage of time, it was realized that certain kind of transactions of transfer of certain kind of shares by certain category of companies only further need to be taxed and accordingly the legislature brought provisions of section 56(2)(vii-a) and 56(2)(vii-b) of Income-tax Act in the statute with effect from 01/06/2010 and 01.04.2013 respectively, **but any other gift by companies or any other person other than individual and HUF still left outside the tax net.** Therefore, the amount received by the assessee is not taxable as gift u/s. 56 of Income Tax Act or any other provisions of the Income Tax Act.”

14.1. Thus Ld. Counsel pleaded that the Assessing Officer is not correct in making the above addition invoking section 50C of the Act, which is liable to be deleted.

15. We have heard rival contentions at length and have given our thoughtful consideration and perused the materials available on record. Section 5 of the Transfer of Property (TP) Act, 1882, defines the term 'transfer of property', as an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living

persons. Further the living persons is explained as any human being or a group of human beings or a Company, University, Firm, Trust or the Body of Individual, Association of Individuals who wants to transfer a property. Thus, TP Act, considers a company not only as a Person but literally speaking as a 'living person', a person with life. The same expression 'person' is provided in section 5 is transplanted in section 122 of the TP Act, which defines a 'gift' as follows:

'Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee'.

15.1 Thus cogent reading of sections 5 and 122 of the TP Act makes it is clear that a company being a "living person" can transfer property by way of gift to another company. Further Section 122 of the TP Act does not prescribe any attributes like "love and affection".

15.2. In light of the law discussed above, there is no restriction in law against a company making Gift of its property, to another company. A transfer without consideration when claimed as a gift is always a gift. Further Section 47(iii) of the I.T. Act, specifically provides that any transfer of a capital asset under a Gift is not regarded as a transfer. Therefore the Plots transferred by the assessee company by way of executing Gift Deed in favour of M/s. Ratnakar Estate Developers Pvt. Ltd. is a valid Gift and not liable for capital gain. Consequently invoking the provisions of Section 50C of the I.T. Act, does not arise in the above transaction. Thus we do not find any infirmity in the order passed by the Ld. CIT(A). Therefore the Ground No. 1 raised by the department is devoid of merits and the same is hereby dismissed.

16. **Ground No.2** relates to disallowance of depreciation of Rs.4,58,137/- on Computer software. The AO disallowed the claim stating that the assessee has only purchased license to use the software and therefore not entitled to claim depreciation at 60%.

16.1 Ld. Counsel submitted that after 1st April, 2003, "computer software" is entitled to depreciation at 60% as per amended provisions of Appendix I of IT Rules, 1962. The rate of 60% applicable in respect of 'computers including computer software' introduced for and from asst. year: 2003-04. It has been classified as a tangible asset w.e.f. 1st April, 2003, under the heading "Plant" in Appendix I to the IT Rules and entitled to depreciation at 60%. Further the expression "computer" has not been defined in the Act. However, it has been defined by under section 2(1)(i) of the Information Technology Act, 2000. As per the said Act, "computer" means any electronics, magnet, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulation of electronics or magnetic or optical impulses and includes all "input-output processing", "storage", "computer software" or "communication facilities" which are "connected or related to the computer" in a "computer system" or "computer network". It may be mentioned that there is no inbuilt system of power supply in the computer.

16.2. It was also submitted that with the rapid advancement in computer software, the technology acquired in a particular year falls into obsolescence very fast and therefore it requires continuous upgrading.

17. Heard rival submissions, depreciation on computer software is no more res integra as this issue is settled by the Special Bench of

the Tribunal in the case of DCIT vs. Datacraft India Limited, (2010) 133 TTJ 0377 (Mum) (SB) wherein it was held that as per the meaning of expression 'computer' could not be restricted only to CPU of computer by pulling out import and output devices from ambit of 'computer'-All input and output devices, which in fact support in receipt of input and outflow of output were also part of 'computer'-When particular hardware or software was used along with computer and when their functions were integrated with computer, such hardware or software would be termed as 'computer'-Items on which Assessee claimed depreciation at rate of 60% by treating them as 'computer' were being used as input or output device of computers-Any device used along with computer and when their functions were integrated with computer came within ambit of the expression 'computer'- Assessee was entitled to avail depreciation at rate of 60% as was applicable to a 'computer'.

18. Respectfully following the above Special Bench decision of the Tribunal, Ground No. 2 raised by the Revenue is devoid of merits, hence the same is hereby dismissed.

19. In the result, the appeal filed by the Revenue is hereby dismissed.

20. In the combined result, the appeal filed by the Assessee is partly allowed and the appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 03-04-2024

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 03/04/2024**

**Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER**

(Rajesh)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-1, Vadodara
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण ,राजकोट/DR,ITAT,
Ahmedabad,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, ITAT, Ahmedabad