

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,  
*IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “B” KOLKATA*

Before **Shri Aby.T Varkey, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

**ITA No.169/Kol/2016**  
Assessment Year :2005-06

DCIT, Cicle-12(2) Aayakar Bhawan, P-7, 6 <sup>th</sup> Floor, Chowringhee Square, Kolkata-69	<b>V/s.</b>	M/s Simplex Projects Ltd., 12/1, Nelli Sengupta Sarani, Kolkaata-700087 <b>[PAN No.AADCS 8598 R]</b>
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Saurabh Kumar, Addl. CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Ravi Tulsiyan, FCA
सुनवाई की तारीख/Date of Hearing	06-10-2017
घोषणा की तारीख/Date of Pronouncement	08-11-2017

**आदेश /O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-4, Kolkata dated 20.11.2015. Assessment was framed by ITO Ward-12(2), Kolkata u/s 144/147 of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 27.12.2010 for assessment year 2005-06.

Shri Saurabh Kumar, Ld. Departmental Representative appeared on behalf of Revenue and Shri Ravi Tulsiyan, Ld. Authorized Representative appeared on behalf of assessee.

2. The Revenue has raised the following grounds:-

*“1. On the fact and circumstances of the case and in law, the Ld. CIT(A) erred by treating the order of the AO as ultra vires and annulling the order of the AO by overlooking the fact that assessee failed to file any objection to the issuance of notice u/s. 148 of the Act within the stipulated time as per the provisions of the ct despite availing ample opportunity by issuing notices.*

2. On the fact and circumstances of the case and in law, the Ld. CIT(A) erred by treating the order of the AO as ultra vires and annulling the order of the Assessing Officer by ignoring the fact that if conscious application of mind is made on the relevant facts and material available or existing at the relevant point of time while making assessment and again a different or divergent view is sought, it would tantamount to change of opinion whereas, in the case of the assessee, no conscious attempt was made on the issue involved for re-opening the case which tantamount to mistake in not considering the relevant point or proposition and hence, it would not be regarded as '**change of opinion**'.

3. In fact and circumstances of the case and in law, the Ld. CIT(A) erred by allowing deduction u/s 80IA of the Act to the assessee as the assessee has not derived income by developing road rather the assessee has been paid off for a fixed amount by the Authority after compliance of provisions of Sec. 194C of the Act.

4. In fact and circumstances of the case and in law, the Ld. CIT(A) erred in by ignoring the fact that the basic intent of the legislature is absent in the work done by the assessee during the relevant period for claiming deduction u/s. 80IA of the Act in assessee's case and at best, the work of the assessee can be regarded as '**work contract**'.

5. The appellant craves leave to add/delete/modify the grounds of appeal before or at the time of hearing."

3. First we take up grounds No. 3 and 4 of the Revenue's appeal where the issue was raised that Ld. CIT(A) erred in allowing the deduction claimed by assessee u/s 80IA of the Act.

4. Briefly stated facts are that assessee is a limited company and engaged in business of civil and engineering construction. During the year as has claimed deduction for ₹1,07,35,440/- u/s 80IA of the Act in respect of its project award by Konkan railway. However, Assessing Officer during the course of assessment proceedings observed that assessee is acting merely as a works contractor and therefore it is not entitled for deduction u/s 80IA of the Act. Thus, the deduction claimed by assessee was disallowed by AO.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who reversed the order of AO by observing as under:-

"4.4 I have considered the submission of the AR of the appellant and perused all the relevant details filed with regard to this ground. I find that the issue was discussed at length in the cases of Simplex-Subhash JV and Simplex-Somdatt Builders JV for AY 2007-08 (IITA No.1684/Kol/2011 & ITA No.1685/Kol/2011 dated 18.06.013) wherein the jurisdictional ITA, Kolkata had adjudicated in favour of the assessee concerned, facts and circumstances remaining the same as in the case of the appellant (supra).

*The ITAT(Kolkata) dealt with the same issue in assessee's own assessee for AY 2007-08 (ITA No.251/Kol/2011 dated 17.01.2014) and based on identical facts allowed deduction u/s 80-IA. Further, the project discussed above, (which covers the entire claim of the assessee u/s 80-IA. Further, the project discussed above, (which covers the entire claim of the assessee u/s. 80-IA) is also covered by the order of the Kolkata Tribunal. Since the issue stands squarely covered in favour of the assessee in its own case for AY 2007-08 for the same project, I do not find any cause to endorse the action of the AO in denying deduction u/s. 80IA to the appellant. In view of the foregoing and on consideration of the submission of the appellant on the issue (supra), the AO is directed to allow deduction as claimed u/s 80IA of the Act."*

The Revenue, being aggrieved, is in an appeal before us.

6. Before us both parties relied on the order of Authorities Below as favourable to them.

7. We have heard the rival contentions of both the parties and perused the material available on record. At the outset, we find that in the identical issue in respect of project awarded by Konkan railway, the Hon'ble Tribunal in assessee's own case has decided the identical issue in favour of assessee in **ITA No.251/Kol/2011** for A.Y 2007-08 dated 17.01.2017. The relevant operative portion of this order is reproduced below:-

... ..It was the further submission that the issue was squarely covered by the decision of the Coordinate Bench of this Tribunal in the case of assessee's sister concern in the case of Simplex Som-Dutt Builders J.V. and Simplex Subhash J.V. in **ITA NO.1684/Kol/2011** and **1685/Kol/2011** dated 18.06.2013 wherein the Coordinate Bench of this Tribunal has held as under at paras 11 to 13 :-

*"11.We have considered the rival submissions. Admittedly, a perusal of the agreement entered into between the assessee and the Govt of Andhra Pradesh Irrigation & CAD Department shows that the assessee has taken EPC/Turnkey contract of the flood flow canal project from SRSP. The name of the contract has been extracted earlier in this order. The scope of the work is also extracted above. Admittedly, the assessee has taken a turnkey contract from the Irrigation Department, Govt. of Andhra Pradesh. The turnkey contract is in respect of the irrigation project. Irrigation project is an infrastructure facility within the scope of Explanation to section 80IA(4) of the Act. The provisions of section 80IA(4) is to be controlled by the Explanation to section 80IA, which has been substituted by the Finance (No.2) Act, 2009 with retrospective effect from 1-4-2000. This Explanation is found after sub-section (13) of section 80IA. The said Explanation attempts to control the provisions of sub-section 4. More so, it says that nothing contained in section 80IA would apply in relation to the business referred to sub-section (4), which is in the nature of works contract. A works contract is not defined in section*

80IA. Now, what would come into consideration is whether the substituted Explanation after sub- clause (13) changed the nature of the meaning of 'infrastructure facility' provided in the Explanation to section 80IA(4). Admittedly, the Explanation to section 80IA(4) gives the meaning the term '**infrastructure facility**'. The substituted explanation after sub clause (13) brings in the nature of work as a works contract. The provisions of section 194C, which deals with TDS in respect of payment to contractors for carrying out any work in the Explanation thereto as explained the term '**work**' to be an inclusive definition, but has provided an exclusion to be 'does not include manufacturing or supplying of a product. according to requirement or specification of the customer by using materials purchased from a person, other than such customer'. Thus, with this in mind, a perusal of the turnkey contract agreement entered into by the assessee with the Irrigation Department, Govt of A.P clearly shows that the construction of all the structures of the whole canal system is to be as per approved design, drawings, specifications of the department etc. The survey is to be done as per investigation and designing criteria of the Irrigation Department. This is also as per article 11.1 of the agreement. The assessee is to procure the materials independently and those materials are to conform to the specifications provided. The assessee is also to make its arrangements for storage of the materials. This is as per article 107 of the agreement. Thus, admittedly the work done by the assessee falls in the exclusion provided to the meaning of the work given in the Explanation to section 194C of the Act. Once it falls outside the meaning of term 'work' for the purpose of section 194C, the question that arises is can it be said that the assessee is doing the work contract as provided in the substituted Explanation in section 80IA after sub clause (13)?, The answer would be emphatic no.

12. This is because the assessee is doing the activity of development of an infrastructure facility as provided under section 80IA(4). The project is a Turnkey project and it cannot form nor have a character of a works contract. Works contract would be applicable to the repairs and maintenance of an existing project. Works contract cannot be in relation to the development of a new project. One of the arguments raised by the learned Sr.DR that the intention of the substitution of the Explanation after sub clause (13) of section 80IA was to deny, the benefit of deduction u/s. 80IA(4) in respect of works contract, but to provide the deduction to such undertakings, which is doing the business of building, operating and Transfer (BOT) and building owning, operating and transfer BOOT as also PPP contracts does not hold water in so far as an irrigation project can never function under BOT or BOOT or PPP . In the circumstances, we are of the view that the assessee's claim is not hit by the substituted Explanation as provided after sub clause (13) of section 80IA. Here, we may mention that this view finds support from the decision of the co-ordinate of the tribunal, [ITAT, Hyderabad Bench, Hyderabad in the case of GVPR Engineers Ltd & Ors (refer to supra). We may mention here that our view also finds support from the decision of the co-ordinate bench of this tribunal, ITAT Cuttack Bench, Cuttack in the case of ARSS Infrastructure Projects Ltd Vs. ACIT, Circle-2 (1), Bhubaneswar in ITA Nos. 142, 143/CTK/2010 & 483,484/CTK/2011 dated 13-06-2013, wherein one of us was a party and in which case it has been held as under :-

“10. Now coming to the merits of the deduction u/s. 801A(4) of the Act. A perusal of the provisions of section 801A(4) of the Act shows that in the explanation ‘infrastructure facility’ has been specified to mean a road including a toll road, a bridge or a rail system. Admittedly, the assessee is doing the business of development of railway tracks and bridges thereof as also roads. If, we are to accept the contention of the Ld. CIT that the provisions of section 801A(4) of the Act after the substitution of the explanation to section 801A(4) of the Act was introduced was only for the purpose of giving the benefit to BUT contracts then, the explanation to section 801A(4) of the Act becomes otiose. This is as explanation to section 801A(4) of the Act specifically provides for the road to include a toll road, a bridge or a rail system. BUT contract in respect of the railway system can never exist. Further, a perusal of the provisions of section 801A of the Act shows that the term ‘works contract’ is not defined in the said section. However, the terms ‘works’ and ‘contract’ is defined in the provisions of section 194C of the Act. If a particular word or term is not defined in the specific section then, one could go to other sections in the said Act where the definition would be available to draw a meaning to the said terms. In the provisions of section 194C of the Act, work has been given an inclusive definition but in the subsequent portion it has excluded the manufacturing or supplying a product according to requirement or specification of a customer by using material purchased from a person other than such customer. As has been specified by the Ld. AR, the assessee is doing contract work but that work is according to the requirement and specification of the customer and the same has been done by using materials purchase from third parties other than the customers. Thus, though the assessee is doing a works contract the same would not fall within the meaning of the word ‘works contract’ for the purpose of the Act due to the exclusion provided in the meaning of ‘work’ in section 194C of the Act. The issue raised by the Ld. CIT that the assessee is not doing the development work but is only doing the contract also does not stand to test as the assessee admittedly is developing the roads and railway lines and the bridges thereof. Development encompasses within itself contract work. The agreement between the assessee and the customer being the government is for the development of the infrastructure facility being roads and rail systems and bridges by participating in the tenders. Under these circumstances, we are of the view that the AO was right in law in granting the assessee the benefit of deduction u/s. 801A(4) of the Act.”

13. In the circumstances, the Assessing Officer is directed to grant the assessee the benefit of deduction u/s. 801A of the Act as claimed.”

*It was the submission that in the circumstances the AO may be directed to grant the assessee benefit of deduction u/s 80-IA of the Act. It was the submission that the Id. CIT(A) had without considering the explanation of the assessee held the issue against the assessee.*

*14. In reply the Id. DR supported the order of the AO and the Id. CIT(A). It was submitted by the Id. DR that the explanation to section 80-IA(13) of the Act introduced by the Finance Act, 2007 was liable to be applied and the assessee was not entitled to deduction u/s 80-IA(4) of the Act.*

15. We have considered the rival submissions. As it is noticed that the issue is squarely covered by the decision of the Coordinate Bench of this Tribunal in the case of assessee's sister concern referred to supra as also on account of the fact that it is noticed that assessee has been paying VAT on the turnover in respect of various projects. The projects which have been undertaken by the assessee in West Bengal and Bihar are also such projects which are assessable under the relevant states VAT Laws In the circumstances we are of the view that the assessee is entitled to the benefit of deduction u/s 80IA(4) as claimed. In the circumstances the AO is directed to grant the assessee benefit of deduction u/s 80IA of the Act as claimed."

In view of the aforesaid facts and respectfully following the decision of Coordinate Bench of this Tribunal, we find no infirmity in the order passed by the Ld. CIT(A). Accordingly, the ground raised by Revenue is dismissed. We hold accordingly.

8. As we have dismissed the appeal by Revenue on merits vide Para 6 and 7 of this order, therefore we are of the view that the other issues raised by Revenue in grounds No. 1 and 2 do not require any adjudication and so these are left open.

9. **In the result, Revenue's appeal stands dismissed.**

Order pronounced in the open court 08/11/2017

Sd/-  
(Aby. T. Varkey)  
(Judicial Member)  
Kolkata,  
\*Dkp Sr.P.s

Sd/-  
(Waseem Ahmed)  
(Accountant Member)

दिनांक:- 08/11/2017 कोलकाता ।

**आदेश की प्रतिलिपि अद्येषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-DCIT, Circle-12(2), Aayakar Bhawan, P-7, 6<sup>th</sup> Floor, Chowringhee Square, Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Simplex Projects Ltd. 12/1 Nellie Sengdupta Sarani,Kolkata-87
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of Office/DDO  
आयकर अपीलीय अधिकरण,  
कोलकाता ।