

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "ए" पुणे में  
IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "A", PUNE

श्री डी. करुणाकरा राव , लेखा सदस्य  
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI D.KARUNAKARA RAO, AM  
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.924/PUN/2016  
निर्धारण वर्ष / Assessment Year : 2012-13

DCIT, Circle-4,  
Pune

.... अपीलार्थी/ Appellant

Vs.

M/s. Parwani Builders,  
Shop No.211/212, 2<sup>nd</sup> Floor,  
City Point, 17 Boat Club Road,  
Pune – 411001  
PAN : AACCP9869P

.... प्रत्यर्थी / Respondent

Assessee by : Shri V.S. Rawat  
Revenue by : Shri Achal Sharma

सुनवाई की तारीख / <b>Date of Hearing : 21.05.2018</b>	घोषणा की तारीख / <b>Date of Pronouncement: 25.05.2018</b>
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**आदेश / ORDER**

**PER D. KARUNAKARA RAO, AM :**

This is the appeal filed by the Revenue against the order of CIT(A)-  
3, Pune, dated 27-02-2016 for the Assessment year 2012-13.

2. Grounds raised by the Revenue are extracted as under :

“1. The Learned Commissioner of Income-tax (Appeals) erred in allowing deduction of Rs. 2,79,23,712/- u/s 80IA(4) of the Income tax Act, 1961.

2. The Learned Commissioner of Income-tax (Appeals) erred in holding that the assessee was a developer within the meaning of sub sec. (4) of section 80IA of the Act and not a contractor as had been held by the Assessing Officer, without appreciating that the assessee had merely carried out works contracts awarded to it by contracting authorities.

3. The Learned Commissioner of Income-tax (Appeals) erred in failing to appreciate that as per the agreements, the assessee was under the direct control and supervision of the contracting authority and that it had not freedom whatsoever to develop, design or modify the work plan and

*was bound to accept any modification as would be issued by the Engineer-in-charge of the contracting authority.*

4. *The Learned Commissioner of Income-tax (Appeals) erred in failing to appreciate that in the agreements entered into by the assessee with various authorities, the assessee had been categorically termed as a "contractor who has entered into a contract and would execute the work in accordance with the contract" and not as a "developer".*

5. *The Learned Commissioner of Income-tax (Appeals) erred in failing to appreciate that Explanation to sub section (13) of section 80IA has made it amply clear that the deduct admissible u/s. 80IA (4) would not be applicable to a business which is in the nature of works contract awarded by any person including the Central or State Government and executed by the undertaking or enterprises referred to in sub section (1) and in the given facts & circumstances of the case the assessee was certainly a contractor and not a developer.*

6. *The Learned Commissioner of Income-tax (Appeals) erred in not appreciating the concept of "developing" and in equating the same with "contracting" and in holding that Explanation to sub section (13) of section 80IA would apply to a sub-contractor and not to a contractor.*

7. *The Learned Commissioner of Income-tax (Appeals) erred in not appreciating the fact that the contractee agencies had deducted tax at sources u/s. 194C from the payments made to the assessee which substantiates the contractor- contractee relationship between the assessee and the developing agencies.*

8. *The appellant craves leave to add alter or amend any or all the grounds of appeals."*

3. Briefly stated relevant facts of the case as emanating from the records are that the assessee is a company engaged in the business of constructions of infrastructural facilities, i.e. construction of dams, tunnels, roads etc. During the year under consideration, the assessee filed the return of income on 28-09-2012 declaring total income of Rs.20,37,263/-. Assessee claimed deduction u/s 80IA(4) of the Act amounting to Rs.2,79,23,712/-. Rejecting the explanation given by the assessee, the AO disallowed the same on the ground that assessee is not a developer and had executed the work on projects as contractor or sub-contractor. The Government departments awarded works contract to the assessee and Govt. is the Developer. The AO accordingly, disallowed the claim of deduction Rs.2,79,23,712/- u/s 80IA(4) of the Act.

4. Aggrieved with the same, assessee filed an appeal before the CIT(A). The CIT(A) vide its order dated 27-02-2016 allowed the appeal of the assessee relying on the orders of the Tribunal in the assessee's own case in ITA Nos.374/PN/2012, 1846/PN/2012, 1819/PN/2013 and ITA No.2206/PN/2014 for the A.Yrs. 2008-09, 2009-10, 2010-11 and 2011-12 respectively. The Tribunal in the previous assessment years decided the issue in favour of the assessee by following the decision of (1) Hon'ble Bombay High Court in the case of CIT vs. ABG Heavy Industries Ltd 322 ITR 323 (2) decision of the Tribunal in the case of BT PATIL & Sons, Belgaum Constructions Pvt. Ltd., vs. ACIT.

5. Now the Revenue is in appeal before the Tribunal challenging the order of CIT(A) with the grounds mentioned above.

6. Before us, at the outset, Shri V.S. Rawat, Ld. Counsel for the assessee submitted that the issue raised in this appeal is squarely covered by the orders of Coordinate Bench in assessee's own case for the preceding A.Yrs. 2008-09 to 2011-12. Ld. Counsel for the assessee filed a copy of order of the Tribunal in ITA No.2026/PN/2014 for A.Y.2011-12, dated 10-11-2016.

7. On the other hand, Ld. DR for the Revenue relied on the order of the AO. However, Ld. DR fairly admitted that this issue has been considered by the Coordinate Bench of the Tribunal in the A.Yrs. 2008- to 2011-12.

8. We heard both the parties on this solitary issue of claim of deduction u/s.80IA of the Act amounting to Rs.2,79,23,712. We have also perused the orders of the Revenue and the orders of the Tribunal in the previous assessment years and find that the issue is squarely covered in favour of the assessee. We therefore proceed to extract the

finding given by the Tribunal in ITA No.2206/PN/2014, dated 10-11-2016 for the A.Y. 2011-12 for the sake of completeness here as under :

*“3. We have heard the parties. The Ld. Counsel submits that identical issue has come for the consideration before the Tribunal in the A.Yrs. 2008-09 and 2009-10 in assessee’s own case and the issue has been decided in favour of the assessee. The Ld. Counsel filed the Tribunal order in assessee’s own case in ITA Nos.374 and 1846/PN/2012 order dated 18-06-2014 which is placed on record. We find that the issue of deduction u/s.80IA(4) stands fully covered in favour of the assessee by the decision of this Tribunal in assessee’s own case in A.Yrs. 2008-09 and 2009-10 (ITA No.374 and 1846/PN/2012 order dated 18-06-2014). The operative part of the decision confirming the order of the Ld. CIT(A) in those A.Y’s is as under :*

*“7. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions relied on by both the sides. We find that the A.O. in the instant case has denied the benefit of deduction u/s. 80IA(4) on the ground that the assessee was a contractor or sub-contractor executing the works contract awarded by the Govt. agencies/statutory agencies and that the assessee is not a developer of the infrastructure facilities. It is only the Govt. agencies or the statutory agencies who were actually developing the infrastructure projects. Relying on the retrospective amendment in Sec. 80IA of the I.T. Act which clarifies that the deduction cannot be allowed in relation to the business in the nature of works contract, the A.O. disallowed the claim u/s. 80IA(4). While doing so he also relied on the decision of the Mumbai Bench of the Tribunal in the case of M/s. B.T. Patil & Sons Belgaum Co. Pvt. Ltd. (supra). We find that the CIT(A) relying on the decision of the Hon’ble High Court of Bombay in the case of ABG Heavy Industries Ltd. (supra) allowed the claim of deduction made by the assessee. We find the Pune Bench of the Tribunal in the case of M/s. Pratibha Construction & Engineering (I) P. Ltd. Vs. ACIT vide ITA No. 118/PN/2008 and other connected appeals for A.Ys. 2003-04 to 2006-07 order dated 27-09-2011 while deciding an identical issue has observed as under:*

*6. We have carefully considered the rival submissions, perused the orders of the authorities below as also the authorities cited at Bar. The crux of the controversy revolves around section 80IA(4)(i) which reads as under:*

*“80IA(4)(i): any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely:-*

*(a) It is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act; ITA No. 2206/ PN/2014, A.Y. 2011-12*

*(b) It has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory*

*body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining new infrastructure facility;*

*(c) It has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:*

*Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.”*

*The claim of the Revenue is that the assessee has acted only as a contractor who has been awarded a work by a Government agency and, therefore, it cannot be seen as carrying on the business of “developing” as envisaged under section 80IA(4) of the Act. In support, the claim of the Revenue is that the assessee is neither operating and maintaining infrastructure facility and nor has the right to undertake the operation and maintenance and, therefore, it does not qualify for the deduction. The argument is further supported by sub-clause (c) of section 80IA(4)(i) which envisages that the assessee is to start operating and maintaining the infrastructure facility on or after 1.4.1995.*

*7. To our mind, the controversy raised by the Revenue has been squarely addressed by the judgment of the Hon’ble Bombay High Court in the case of ABG Heavy Engg. Ltd. (supra) and the following portion of the judgment is worthy of notice:*

*“22 The submission which was urged on behalf of the revenue is that under clause (iii) of sub-section (4) of section 80IA, one of the conditions imposed was that the enterprise must start operating and maintaining the infrastructure facility on or after 1st April, 1995. The same requirement is embodied in sub-clause (1) of sub-clause (4) of the amended provisions. It was urged that since the assessee was not operating and maintaining the facility, he did not fulfill the condition. The submission is fallacious both in fact and in law.*

*That the assessee was maintaining the facility is not in dispute. The facility was commenced after 1st April, 1995. Therefore, the requirement was met in fact. Moreover, as a matter of law, what the condition essentially means is that the infrastructure facility should have been operational after 1st April, 1995. After section 80-IA was amended by the Finance Act, 2001, the section applies to an enterprise carrying on the business of (1) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining any infrastructure facility which fulfills certain conditions. Those conditions are (1) ownership of the enterprises by a company registered in India or by a consortiums; (ii) an agreement with the Central or State Government, local authority or statutory body; and (iii) The start of operation and maintenance of the infrastructure facility should commence after 1st April, 1995.*

*The requirement that operation and maintenance of the infrastructure facility should commence after 1st April, 1995 has to be harmoniously construed with the main provision under which deduction is available to an assessee who develops or operates and maintains, or develops, operates and maintains an infrastructure facility.”*

*A harmonious reading of the provisions in its entirety would lead to the conclusion that the deduction is available to an enterprise which (i) develops; or operates and maintains; or (iii) develops, maintains and operates that infrastructure facility. However, the commencement of the operation and maintenance of the infrastructure facility should be after 1st April, 1995. In the present case the assessee clearly fulfilled this condition.”*

*Before the amendment that was brought about by Parliament by Finance Act, 2001 we have already noted that the consistent line of circular of the Board postulated the same position. The amendment made by Parliament to S. 80IA(4) of the Act, set the matter beyond any controversy by stipulating that the three conditions for development, operation and maintenance were not intended to be cumulative in nature.” (underlined for emphasis by us)*

*8. Notably, even in the case before the High Court, the assessee acted as a contractor for Government agency and was held eligible for the purposes of claim of deduction under section 80IA(4) of the Act. As per the legal position opined by the Hon’ble High Court, it is evident that an assessee who only develops infrastructure facility (even as a contractor) but does not have an occasion to operate and maintain is also eligible for claim of deduction under section 80IA(4) of the Act and the Hon’ble High Court has explained that qua such a person the condition stated in sub-clause (c) of section 80IA(4)(i) has to be read harmoniously with the main provision under which deduction is available to an assessee, who develops; or operates and maintains; or develops, maintains and operates an infrastructure facility. In other words, as opined by the Hon’ble High Court, a developer who only develops (i.e. constructs) an infrastructure facility and is not envisaged to operate and maintain such facility, cannot be expected to fulfil the condition in clause (c) of section 80IA(4) since it would be an impossibility. Therefore, in view of the construction placed by the Hon’ble Bombay High Court on the requirements of clause (c) of section 80IA(4)(i), requiring it to be harmoniously read with the main clause of section 80IA(4)(i), we find that the objection raised by the Revenue in the present case is devoid of merits. The reasoning enunciated by the Hon’ble Bombay High Court as extracted above fully answers the controversy raised by the Revenue in the present case and, therefore, we find that the assessee has to succeed in this appeal in the present case. Accordingly, the Ground of appeal raised before us and which is common in all the years is adjudicated in favour of the assessee.*

*9. Resultantly, the captioned appeals of the assessee are allowed.*

*8. Respectfully following the decision of the jurisdictional High Court in the case of ABG Heavy Industries Ltd. (supra) which has been followed by the Co-ordinate Bench of Tribunal in the case of M/s. Pratibha Construction & Engineering (I) P. Ltd. (supra) we find no infirmity in the order of the CIT(A) allowing the claim of deduction/s. 80IA(4)(i) made by the assessee.*

9. So far as the decision of the Hon'ble Karnataka High Court in the case of Yojaka Marine (P) Ltd. Vs. ACIT reported in 35 taxmann.com 408 (Karnataka) relied on by the Ld. Departmental Representative is concerned the same in our opinion is not applicable to the facts of the instant case in view of the decision of the jurisdictional High Court cited (supra) which is binding on us. In this view of the matter we uphold the order of the CIT(A) and the grounds raised by the Revenue are dismissed.”

4. As the facts are identical in this year also, hence, there is no reason to take a different view. We therefore following the order of this Tribunal in assessee's own case dismiss the grounds taken by the Revenue.

5. In the result, Revenue's appeal is dismissed.”

From the above, it is evident that in the matters like this, the contractors are considered as the developers who are eligible for deduction u/s.80IA(4) of the Act in respect of the eligible profits. Considering the above and in absence of any contrary material to decide the issue against the assessee, we dismiss the grounds raised by the Revenue.

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on this 25<sup>th</sup> day of May, 2018.

Sd/-

Sd/-

**(VIKAS AWASTHY)**

**न्यायिक सदस्य / JUDICIAL MEMBER**

**(D. KARUNAKARA RAO)**

**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 25<sup>th</sup> May, 2018  
सतीश

**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. CIT-3, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A Bench" Pune;
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune