आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

आयकर अपील सं./**ITA No.274&275/CTK/2016**

(**निर्धारण वर्ष /** Assessment Years : 2010-2011 & 2011-2012)

ITO, Ward-4(3), Bhubaneswar	Vs.	Backbone ARSS JV, Plot No.38, Sector-A, Zone-D, Mancheswar Ind. Estate, Bhubaneswar
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAAAB 7056 Q**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** /Revenue by : Shri D.K.Pradhan, DR
निर्धारिती **की ओर से** /Assessee by : Shri P.S.Panda/K.Agarwalla, AR
सुनवाई की तारीख **/ Date of Hearing : 18/09/2017**
घोषणा की तारीख**/Date of Pronouncement 19/09/2017**

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM:

The revenue has filed appeals against the order of CIT(A), Cuttack-2, dated 16.03.2016, passed u/s.143(3) of the Income Tax Act, 1961 for the assessment year 2010-2011 & 2011-2012.

2. Since the issues are common, both appeals are heard and disposed off by this common order. For the sake of convenience we shall consider the facts narrated in appeal in ITA No.274/CTK/2016, wherein the revenue has raised as under :-

> *1. On the facts and in the circumstances of the case, the Ld.CIT(A) is not justified in law as well as on facts in deleting the addition of Rs.80,04,850/- made by the AO by disallowing the claim of the assessee u/s.80IA(4) of the Act.*

3. Brief facts of the case are that the assessee is engaged in works contract and filed the return of income for the assessment year 2010-2011 on 20.09.2010 with total income of Rs.Nil. The case was selected for scrutiny through CASS and notice u/s.143(2) of the Act was issued. In

compliance to the same, ld. AR of the assessee appeared from time to time and filed the details and the case was discussed. The books of accounts and vouchers/bills of the major heads of expenses were test checked. The AO is of the observation that the assessee is a joint venture entity engaged in the business of works contract. And filed return of income after claiming deduction u/s.80IA of the Act, whereas as per the provisions of Section 80IA of the Act if an undertaking or enterprise is involved in the business of works contract awarded by any person including Central and State Government, then it will not be eligible for deduction u/s.80IA of the Act. Ld. AO found that the assessee is executing works contract on contractual basis rather than working on its own and disallowed the claim u/s.80IA and assessed the total income at Rs.80,04,850/- and passed the order u/s.143(3) of the Act, dated 31.12.2012.

4. Aggrieved by the order of AO, the assessee filed an appeal with the CIT(A). In the appellate proceedings, ld. AR of the assessee appeared and argued the grounds and reiterated the submissions made before the AO and relied on the order of Tribunal in assessee's own case wherein the Tribunal has considered the facts of works contract executed by the assessee and held that the assessee is entitled for deduction u/s.80IA of the Act. The ld. CIT(A) followed the decision of the coordinate bench of the Tribunal and allowed the appeal.

5. Aggrieved by the order of CIT(A), the revenue has filed an appeal before the Tribunal.

6. Before us, ld. DR of the revenue argued the grounds and submitted that the CIT(A) is not justified in deleting the addition as the AO has made elaborate observation on claim of deduction u/s.80IA(4) of the Act, whereas ld. AR supported his arguments and relied on the findings of CIT(A) and coordinate bench of Tribunal decision in assessee's own case and produced copy of the order and further submitted that in earlier assessment year i.e. A.Y.2008-09, the Tribunal has allowed the deduction claimed by the assessee u/s. 80IA(4) of the Act and prayed for dismissal of revenue's appeal

7. We have heard the rival contentions and perused the material on record. The sole crux of the issue is with respect of the eligibility of deduction u/s.80IA(4) of the Act. Ld. AR of the assessee has submitted that the assessee is entitled deduction u/s.80IA(4) of the Act and the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for the assessment year 2008-09. On the query from the bench to ld. DR whether appeal u/s.260A of the Act was filed against the order of the Tribunal before the Hon'ble High Court. The ld. submissions of DR for the revenue are not satisfactory. We perused the order of the coordinate bench of the Tribunal in ITA No.121 to 126/CTK/2013, dated 11.01.2016, wherein the Tribunal has held as under:-

> *8. We have considered rival contentions and carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by ld. AR and DR in the context of factual matrix of the case.From the record - we found that the assessee has undertaken infrastructure project. As per the terms*

and conditions of the infrastructure project so awarded, we found that assessee has worked as a developer of infrastructure project and not merely as a contractor. As per the detailed scope of the work undertaken by the assessee, it can be safely concluded that on the facts and circumstances of the case, the assessee has worked as a developer and not merely as a contractor. Accordingly, we do not find any merit in the action of the AO for declining the claim of deduction u/s.80IA(4). The assessee has not adversely hit by the Explanation below Section 80IA inserted by the Finance Act, 2009 with retrospective effect from 1-4-2009, insofar as the assessee is not working merely as a contractor but as a developer. Even as per Explanation to Section 80IA(4), infrastructure facility includes roads including toll road, bridge or rail system. We found that assessee has fulfilled all the conditions for entitlement of deduction, even viewing from the point of view of Explanation so inserted by the Finance Act, 2009. This issue is also covered by the decision of Hon'ble Bombay High Court in the case of ABG Heavy Industries Ltd., 322 ITR 323, wherein the Hon'ble Bombay High Court held as under :-

> *"Right from 1996, the CBDT was seized with the question, as to whether infrastructure facilities developed under a BOLT project would qualify for exemption under section 80-IA. The first circular in that regard was issued on 23-1-1996, which specifically dealt with whether section 80-IA(4A) would be applicable to a BOLT Scheme involving an infrastructure facility for the Indian Railways. The circular clarified that an infrastructure facility set up on a BOLT basis for Railways would qualify for deduction. That was followed by the two circulars of the CBDT dated 23-6-2000 and 16-12-2005. The first of those circulars recognized that structures for storage, loading and unloading, etc., at a port built under a BOT and BOLTscheme would qualify for deduction. Now there is no question of an enterprise operating a facility in a BOLT Scheme because such a scheme contemplates that the enterprise would build, own, lease and eventually transfer the facility to the authority for whom the facility is constructed. The subsequent circular dated 16-12-2005 once again clarified the position of the CBDT that structures, which have been built, inter alia, under a BOLT Scheme up to the assessment year 2001-02, would qualify for a deduction under section 80-IA. In fact, from the assessment year 2002-03, the process was further liberalized, consistent with the basic purpose and object of granting the concession. In this background, particularly in the context of the objective sought to be achieved and in the absence of any challenge on the part of the revenue on the applicability of the binding circulars of the CBDT, the condition as regards development, operation and maintenance of an infrastructure facility was contemporaneously construed by the authorities at all material times, to cover within its purview the development of an infrastructure facility under a scheme by which an enterprise would build, own, lease and eventually transfer the facility. This was perhaps a practical realisation of the fact that a developer may not possess the wherewithal, expertise or resources to operate a facility, once constructed. The Parliament eventually stepped in to clarify that it was not invariably necessary for a developer to operate and maintain the facility. The Parliament when it amended the law was obviously aware of the administrative practice*

resulting in the circulars of the CBDT. The fact that in such a scheme, an enterprise would not operate the facility itself was not regarded as being a statutory bar to the entitlement to a deduction under section 80-IA. The Court could not be unmindful in the instant case of the underlying objects and reasons for a grant of deduction to an enterprise engaged in the development of an infrastructure facility. The provision was intended to give an incentive to investment for infrastructural growth in the country. In Bajaj Tempo v. CIT 119921 196 ITR 188/62 Taxman 480, the Supreme Court emphasized that a provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. In the instant case, the administrative circulars issued by the CBDT proceeded on that basis by adopting a liberal view of the scope and ambit of the provisions of section 80-IA. The Tribunal having only followed these provisions, there was no just reason to interfere in the Court's appellate jurisdiction. [Para 21]

As regards the revenue's contention that the enterprises must start operating and maintaining the infrastructure facility on or after 1-4-1995, the Tribunal had entered a finding that the assessee was operating the facility. That the assessee was maintaining the facility was not in dispute. The facility was commenced after 1-4-1995. Therefore, the requirement was, in fact, met. Moreover, as a matter of law, what the condition essentially means is that the infrastructure facility should have been operational after 1-4-1995. After section 80-IA was amended by the Finance Act, 2001, the section applies to an enterprise carrying on the business of (i) developing or. (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils certain conditions. Those conditions are : (i) ownership of the enterprise by a company registered in India or by a consortium: (ii) an agreement with the Central or the State Government, local authority or statutory body; and (iii) the starting of operation and maintenance of the infrastructure facility on or after 1-4-1995. The requirement that the operation and maintenance of the infrastructure facility should commence after 1-4-1995 has to be harmoniously construed with the main provision under which a deduction is available to an assessee who develops or operates and maintains or develops, operates and maintains an infrastructure facility. Unless both the provisions are harmoniously construed, the object and intent underlying the amendment to the provision by the Finance Act, 2001 would be defeated. A harmonious reading of the provision in its entirety would lead to the conclusion that the deduction is available to an enterprise which fi) develops or (ii) 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 1-4-1995. In the instant case, the assessee clearly fulfilled that condition. [Para 22]

The subsequent amendment to section 80-IA(4A) to clarify that the provision would apply to an enterprise engaged in (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining an infrastructure facility was reflective of the position which was always construed to hold the field. The amendment made by the Parliament to section 80-IA(4) 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. [Para 23]*
>
> *Therefore, the Tribunal was justified in holding that the assessee had carried on the business of developing, maintaining and operating an infrastructural facility so as to entitle it to a deduction under section 80-1 A. [Para 23]*

In the instant case, the work of the assessee is in the nature of infrastructure development. From the above order of Hon'ble High Court, looking to the nature of work of the assessee, we found that the assessee is entitled for deduction u/s.80IA(4). Accordingly, we do not find any merit in the action of AO in declining assessee's claim of deduction u/s.80IA(4) of the Income Tax Act.

8. We, respectfully follow the judicial precedence and confirm the order of CIT(A) in directing the AO to delete the addition. Accordingly, we dismiss the grounds of appeal of the revenue.

9. Similarly, the revenue has filed appeal in ITA No.275/CTK/2016 for the assessment year 2011-2012. Since we have decided the very same issue in appeal of the revenue for assessment year 2010-2011 following the decision of the Tribunal. Accordingly, we also dismiss this appeal of the revenue.

10. In the result, appeals of the revenue are dismissed.

Order pronounced in the open court on this 19/09/2017.

Sd/-	**Sd/-**
(N. S. SAINI)	**(PAVAN KUMAR GADALE)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 19/09/2017

प्र.कु.मि/PKM, Senior Private Secretary

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

1. अपीलार्थी / The Appellant-
   ITO, Ward-4(3), Bhubaneswar
2. प्रत्यर्थी / The Respondent-
   Backbone ARSS JV,
   Plot No.38, Sector-A, Zone-D,
   Mancheswar Ind. Estate, Bhubaneswar
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack

6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(**Senior Private Secretary**)
आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack