

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA Nos.742 & 743/M/2018
Assessment Years: 2011-12 & 2012-13**

M/s. Thakur Infraprojects Pvt. Ltd., Plot No.265/1, Om Sadanika, Uran Road, Panvel, Dist. Raigad PAN: AACCT6451F	Vs.	DCIT-Panvel Circle Panvel Circle Dist. Raigad
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Devendra Jain, A.R.
Revenue by : Shri Amit Pratap Singh, D.R.

Date of Hearing : 27.10.2020
Date of Pronouncement : 08.01.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled two appeals have been preferred by the assessee against the order dated 30.11.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12 & 2012-13.

2. Since the facts and issues involved in these two appeals are identical in nature, hence the same are taken together for disposal by this common order. For the sake of convenience grounds raised by the assessee are taken from ITA No.743/M/2018 A.Y. 2012-13 which are as under:

"1. In the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in retaining the disallowance u/s 80IA of Rs 68,22,830/-. The addition made may please be deleted.

2. In the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance of labour charges to 1% of the total purchases to Rs. 4,16,430/-. The addition retained may please be deleted.

3. Without prejudice to above, in the facts and circumstances of the case and in law, the Ld. CIT(A) had erred in restricting to 1% of purchases for A.Y. 2011-12 of Rs. 4,16,43,098/- instead of 1% of purchases for A.Y. 2012-13 of Rs. 3,03,80,063/-. In the facts and circumstances of the case and in law, the Ld. CIT(A) had erred in upholding the addition of Rs.34,541/- u/s 14A read with rule 8D of the Act. The addition retained may please be deleted.

4. Without prejudice, in the facts and circumstances of the case and in law, the Ld CIT(A) has erred in retaining the working under rule 8D, which is defective and erroneous.”

3. The issue raised in ground No.1 is against the confirmation of disallowance of Rs.68,22,830/- by Ld. CIT(A) as made by the AO by rejecting the claim of the assessee under section 80IA of the Act in respect of parking lot developed on CIDCO land at truck terminal.

4. The facts in brief are that AO on the basis of computation of income noticed that assessee has claimed a deduction under section 80IA of the Act amounting to Rs.68,22,830/-. Accordingly, the assessee was called upon to furnish the audit report and justify the claim vide letter dated 23.01.2015 by the AO. The assessee furnished the copy of audit report in form No.10CCB and also filed detailed justification for deduction Rs.8,73,817/- for assessment year 2011-12 and Rs.68,22,830/- for assessment year 2012-13 in respect of the project which is integral part of the highway project. It was submitted before the AO that the parking lot developed by the assessee falls within the meaning of infrastructure facility in terms of the Finance Act, 2001 which has modified the definition of infrastructure facility to include the highway project including housing or other amenities being integral part of the highway project. The assessee submitted before the AO that it has developed parking

lot with access road at truck terminal, Kalamboli, Navi Mumbai on BOT basis and is responsible for repair, maintenance and operation of the said parking lot. It was submitted that it involved complete creation of infrastructure facility and operation and maintenance of the project for next 20 years. The said project was awarded by CIDCO to the assessee and after it was constructed, it was inspected by CIDCO and a work completion certificate was granted to the assessee. The said truck terminal operated by the assessee has the following facilities:

- > Parking of truck at small fee
- > Safety and security of truck and material there in
- > Eating facilities
- > Pure drinking water facility
- > Repair facilities including the tyre puncher, engine repairing, body repairs, coloring, Radiators works, spare parts stores, servicing center, leath Machine work etc.
- > Bathroom and washing facilities
- > Rest room
- > Security Monitoring for all parking area by way of CCTV cameras.

5. The AO after considering the submissions of the assessee came to conclusion that assessee is not eligible to claim deduction under section 80IA of the Act by observing and holding as under:

“4. I have carefully gone through the versions of the assessee reproduced above, agreement with CIDCO relating to this project and the facts of the case. To have a clear concept on the project, I have also seen the project. From the agreement with CIDCO it is very clear that the assessee has been entrusted with, Repair, Maintenance and operation of a parking lot in Kalamboli steel market on BOT basis. Accordingly the assessee has developed the parking lot and is collecting parking charges from the persons parking their vehicles. The assessee is also paying certain specified amount to CIDCO as per the agreement. In the submission reproduced above the main contention of the assessee is that the project is an integral part of a high way project. However the fact is that the parking lot developed by the assessee is in Kalamboli steel market and not on any highway. Thus the contention that the project is an integral part of a highway project is factually incorrect.

4.1 In this context it is also worthwhile to look at the claim, done by the assessee. During A. Y. 2011-12 the assessee has claimed deduction u/s. 80IB on this very project. However during A. Y. 2012-13 deduction has been claimed u/s. 80IAB. Thus even the assessee is not clear under which section it is claiming the deduction. In this context it is also worthwhile to have a look at the relevant portion of the audit report in form No. 10CCB wherein the project is specified. For the sake of clarity the same is reproduced below:

16. Development, operation, Maintenance of
- (a)
- (b)
-

4.2 In this case the assessee has developed a parking lot on a CIDCO land at Truck Terminal No.5. On this project the assessee intends to claim deduction u/s. 80IA of I. T. Act 1961 on the plea that it is an integral part of Highway project. As brought out above this project is not on the highway & hence there is no question it being an integral part of the Highway. The fact is that CIDCO instead of developing a parking lot on its own, has allowed the assessee to develop a parking lot on its land on BOT basis and has allowed collection of parking charges. For having used the CIDCO land the assessee is paying a yearly fee to CIDCO. The assessee is also making a handsome profit on account of operation and maintenance of the parking lot. The parking lot is being run in a commercial way for profit. The project developed by the assessee is at par with any other parking lot in a park, multiplex or a shopping mall. If the claim of the assessee is in accordance with the provisions of I. T. Act, 1961, income from all such parking lots will also be eligible for deduction u/s. 80IA of I. T. Act, 1961. However there is no specific provision in section 80IA which allows deduction u/s. 80IA for such projects.

4.3 Infrastructure facility eligible for deduction u/s. 80IA has been specified in the Act. As per explanation (b) to section 80IA(4) an infrastructure facility means a highway project including housing or other activities being an integral part of the project. However in the case of the assessee the parking lot developed, operated and maintained by the assessee is not on the highway and hence is not a part of any highway project. The highway near the parking lot is Panvel Taloja road and is a very old state highway and the same is not developed by the assessee. Further more parking lot is not even on Panvel Taloja highway. Therefore the parking lot on which deduction u/s. 80IA is claimed obviously is not an infrastructure facility eligible for deduction u/s. 80IA of I. T. Act, 1961. Looking at the provisions of section 80IA of I. T. Act, 1961, and the intentions behind the introduction of the section, I am of the clear view, that the claim of the assessee u/s. 80IA is not in accordance with the provisions of I. T. Act, 1961. Therefore the claim of deduction u/s. 80IA of Rs.68,22,830/- is disallowed. Since the assessee has furnished inaccurate particulars of income, penalty proceedings u/s. 271(1) (c) of the Act are initiated separately."

6. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

"9. I have carefully gone through the facts of the case, findings of the AO in the assessment order, submissions of the Ld. AR and material placed on record. From the facts of the case it is noticed that in the return of income the appellant had claimed the deduction of Rs 8,73,817/- u/s 80IB of the Act in A Yr 2011-12 and Rs.68,22,830/- u/s 801AB of the Act in AYr 2012-13. In the absence of audit report with the return of income, the AO could not ascertain the exact nature of income against which the said deductions have been claimed. Accordingly the AO resorted to call for audit reports along with the other details for justifying the genuineness of above claims. In compliance the AR of the appellant attended the proceedings and reclassified the claim of above deductions u/s 80IA of the Act instead of 80IB/80IAB of the Act claimed in the original returns of income. As regard non filing of audit reports along with IT returns is conducted it is stated that merely not filling the audit report along with IT returns will not disentitle the appellant for claiming above deduction. As per A.O. the deduction u/s 80IA of the Act is admissible only if the account of the appellant have been audited by the CA and the audit report duly signed and verified by such accountant is furnished along with return of income. In view of these facts the AO concluded that there is no consistency in the stand of the appellant and non filing of audit report along with the return of income also affirms that the appellant is not sure about correctness of its claim which he had made u/s. 80IB/80IAB of the Act as above. The AO further observed that the auditor in the audit report referred the truck parking terminal as an industrial park/SEZ, which was corrected and claimed as truck parking terminal during the assessment proceedings.

9.1 From the facts of the case it is noticed that the appellant had entered into an agreement with CIDCO for repairs, maintenance and operation of parking lot i.e. truck parking terminal in 6.40 hectare piece of land, at Kalamboli Steel market, which is located Diva Panvel Railway Line on its eastern side and NH 4 bypass (Mumbai-Pune old express way) on its southern side. Accordingly it had repaired the truck parking terminal and as per agreement, started collecting the parking charges from the truckers. It has also created other amenities such as dhaba, small shops, rest rooms, canteens, restaurant, repair shops etc., in the said land for providing facilities to the truck drivers and also merchandizing the goods and services on commercial basis for profits. As per agreement, the certain part of the fees collected against parking was also paid to the CIDCO, with an annual increment of 10%. The appellant had claimed the above deductions with the plea that the truck parking terminal is an integral part of highway projects, hence eligible for said deduction, as per provisions of Sec 80IA(4) of Act.

9.2 The AO, however, observed that the truck parking terminal is an independent contract between appellant and CIDCO for repair, maintenance and operating it, for certain period on contract basis and has nothing to do with the highways, which have been built either by the Government or other players independently, hence the truck parking terminal, awarded by way of contract for repair, maintenance and operation, cannot be classified as integral part of the highway. The AO further observed that the CIDCO has awarded the contract of truck parking terminal to the appellant for repair, maintenance and operating it for certain period, by way of contract, hence the same cannot be classified as infrastructure developed by the appellant, as has been defined in the provisions of Explanation (b) to Sec 80IA(4) of

the Act, which inter-alia state that "**(b) a highway project including housing or other activities being an integral part of the highway project**". The AO further noticed that the appellant is collecting truck parking charges from various truck owners and the same is shared with the CIDCO, as per their agreement, with annual increment of 10%, on commercial basis.

9.2 From the above facts it is seen that this truck parking terminal was already existing in the Kalamboli Steel Market and the contract was awarded to the appellant for renovating/repairing, maintaining and operating it for certain period, to generate income for itself as well as for CIDCO, on commercial basis. It is pertinent to mention here that in the country where ever there are big market hubs/shopping centers/malls, such parking lots are maintained by the contractors on contract basis, by way of repair, maintenance and operation and the revenue is shared between the contractors and the land parking terminal owners. In this case the appellant had developed other amenities, such as rest rooms, restaurants, drinking water facilities, repair shops, other retain shops of daily needs etc.. to facilitate the people coming therein including drivers, for commercially exploiting the facilities. Keeping in view the facts as discussed above, in my considered opinion, the contract of truck parking terminal, awarded to the appellant for repair, maintenance and operating, for certain period, on commercial basis, cannot be classified as infrastructure under any provision of Sec 80IA(4) of the Act, hence not eligible for claim of deduction made u/s 80IA of the Act. As regards the case laws relied by the appellant are concerned, it is seen that they are distinguishable from the facts of the case under dispute, hence not comparable. Accordingly the claims of deduction of Rs 8,73,817/- and Rs. 68,22,830/-, for A Yr 2011-12 and 2012-13, respectively, disallowed by the AO, are hereby sustained and above grounds of appeal, for both the years, are dismissed."

7. We have heard the rival submissions of both the parties and perused the material on record. We find that in this case the assessee was awarded a project by CIDCO to construct a parking lot called truck terminal having facilities on BOT basis. Under the terms of award, the assessee was responsible for repair, maintenance and operation of the said terminal. The assessee used to collect fee from the truck owners from the trucks and also pay yearly fee to CIDCO. According to the AO the assessee is not eligible for deduction under section 80IA of the Act on the ground that the truck terminal is not an infrastructure facility which was affirmed by Ld. CIT(A) in the appellate order. According to the revenue authorities the truck parking terminal is an independent contract with CIDCO which

has nothing to do highways. So the issue before us is whether the truck terminal is an integral part of highways or not. We note that Finance Act, 2001 has modified the definition of infrastructure facility which means a highway project including housing or other activities being an integral part of the highway project. It is clear from the amended definition that any infrastructure which is part of the high way falls within the definition of infrastructure. After perusing the facts on record carefully and also examining the terms and conditions of award of contract to the assessee to construct, build or operate the said terminal on BOT basis, we find that this is an integral part of highway though the highway was existing already and it was only a stand alone project awarded to the assessee later on. We have also noticed that the said terminal was having various facilities as stated hereinabove. The case of the assessee finds support from the decision of Dy. Commissioner of Income Tax Vs. Vintage Advertising Pvt. Ltd. (2015) 60 taxmann.com 162 (Kolkata- Tribunal) wherein it has been held that assessee is entitled for deduction under section 80IA of the Act on bus shelter and foot over bridge. The operative part is reproduced as under:

“9. We have heard both counsel and carefully perused the records. The learned Departmental representative submitted that the assessee is not at all eligible for deduction under section 80-IA of the Act on bus shelters and foot overbridges. The learned Departmental representative submitted that as in this case it is not the case that the assessee has gained any profit or gain from the said business upon which deduction under section 80-IA of the Act is being claimed. The learned Departmental representative submitted that it is not the case that any toll/fee is being charged for the use of foot overbridges or bus shelter for which deduction under section 80-IA of the Act is being claimed. The learned Departmental representative submitted that the assessee is earning income by way of advertising on the foot overbridges and bus shelters which is the subject matter of the assessee's claim of deduction under section 80-IA of the Act. The learned Departmental representative submitted that the income on account of advertisement cannot said to be an income derived by an undertaking from the

business of infrastructure development. Hence he submitted that the assessee cannot be allowed deduction under section 80-IA of the Act. The learned Departmental representative made elaborate submissions with respect to meaning of phrase "derived from". He also referred to several case law including the decision of the hon'ble apex court in the case of *Liberty India v. CIT* [\[2009\] 317 ITR 218/183 Taxman 349 \(SC\)](#). Referring to the ratio emanating from the aforesaid apex court's decision the learned Departmental representative submitted that the profit of the assessee from the advertising business would certainly be profits and gains of the business in terms of section 28 of the Act, the same would not amount to profits or gains derived from the industrial undertaking. The learned Departmental representative further referred to the hon'ble Calcutta High Court's decision in the case of *Mukherjee Estate (P.) Ltd. v. CIT* [\[2000\] 244 ITR 1/113 Taxman 313](#) for the proposition that income mainly publicity charges by putting up hoarding/displaying advertisement from a building cannot be treated as income from property but income from other sources. The learned Departmental representative further submitted that the above proves that the assessee's income does not include any profit which is derived from developing or (ii) operating and maintaining or (iii) developing, operating and maintaining foot overbridge and bus shelter. The learned Departmental representative further submitted that the hon'ble Karnataka High Court in the case of *CIT v. Skyline Advertising (P.) Ltd.* [\[2014\] 225 Taxman 220 \(Mag.\)/45 taxmann.com 532](#), has held that the benefit under section 80-IA of the Act can be extended only to those assesseees who have developed infrastructure facility as defined under section 80-IA(4) of the Act. The hon'ble High Court discussed the fact of the case that the assessee has not developed road or a toll road, bridge, highway or a rail system. However, it had developed the existing road median, erected bus shelters and light poles for its advertisement business, which, in any case cannot be treated as infrastructure development. Accordingly, the hon'ble High Court decided the question of law in favour of the Revenue and against the assessee. In view of the above the learned Departmental representative prayed that the assessee cannot be allowed any deduction under section 80-IA of the Act.

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decision of the hon'ble apex court in the case of *Liberty India v. CIT* [2009] 317 ITR 218/183 Taxman 349 (SC). Referring to the ratio emanating from the aforesaid apex court's decision the learned Departmental representative submitted that the profit of the assessee from the advertising business would certainly be profits and gains of the business in terms of section 28 of the Act, the same would not amount to profits or gains derived from the industrial undertaking. The learned Departmental representative further referred to the hon'ble Calcutta High Court's decision in the case of *Mukherjee Estate (P.) Ltd. v. CIT* [2000] 244 ITR 1/113 Taxman 313 for the proposition that income mainly publicity charges by putting up hoarding/displaying advertisement from a building cannot be treated as income from property but income from other sources. The learned Departmental representative further submitted that the above proves that the assessee's income does not include any profit which is derived from developing or (ii) operating and maintaining or (iii) developing, operating and maintaining foot overbridge and bus shelter. The learned Departmental representative further submitted that the hon'ble Karnataka High Court in the case of *CIT v. Skyline Advertising (P.) Ltd.* [2014] 225 Taxman 220 (Mag.)/45 taxmann.com 532, has held that the benefit under section 80-IA of the Act can be extended only to those assesseees who have developed infrastructure facility as defined under section 80-IA(4) of the Act. The hon'ble High Court discussed the fact of the case that the assessee has not developed road or a toll road, bridge, highway or a rail system. However, it had developed the existing road median, erected bus shelters and light poles for its advertisement business, which, in any case cannot be treated as infrastructure development. Accordingly, the hon'ble High Court decided the question of law in favour of the Revenue and against the assessee. In view of the above the learned Departmental representative prayed that the assessee cannot be allowed any deduction under section 80-IA of the Act.

10. Learned counsel for the assessee, on the other hand, submitted that the issue is squarely covered in favour of the assessee by the Tribunal's decision as mentioned above. In the said order the Tribunal had held as under :

"After hearing both sides, we find that the assessee has claimed deduction under section 80-IA on bus shelters treating the same as integral part of highway and development infrastructure. For the purpose of highway system the building of the bus shelters are functional necessity and these are inextricably connected with the infrastructure required for highway. Without bus shelters the smooth movement of the vehicles and the operation of the vehicles through the highway shall not be of desired level. Thus the bus shelters are functionally necessary part and parcel of the highway infrastructure. By holding so we find that the learned Commissioner of Income-tax (Appeals) has rightly allowed the appeal of the assessee on this issue. We uphold the same and dismiss this ground of appeal taken by the Department."

11. Learned counsel further submitted that the abovesaid order of the Tribunal had been appealed against by the Department in the hon'ble High Court and the hon'ble Calcutta High Court has not yet reversed the decision of the Income-tax Appellate Tribunal. Hence he submitted that the Tribunal's orders should be sustained. Learned counsel further submitted that the issue involved is covered in favour of the assessee by the decision of the Tribunal in the case of *Dy. CIT v. Selvel Advertising (P.) Ltd.* [2015] 58 taxmann.com 196 (Kol.) wherein the identical issue has been decided in favour of the assessee. In that case it was also pointed out that

the hon'ble Calcutta High Court had passed an order confirming the order of the Income-tax Appellate Tribunal in quashing a revision order passed by the learned Commissioner of Income-tax under section 263 of the Act whereby allowance of section 80-IA of the Act on bus shelters and foot overbridges was disallowed.

12. Learned counsel for the assessee further submitted that section 80-IA of the Act provides for deduction on account of profits and gains derived by an industrial undertaking from any business referred to therein. Learned counsel further submitted that the hon'ble apex court in the case of Liberty India (supra) dealt with the question whether the profit from the Duty Entitlement Pass Book Scheme (DEPB) and the Duty Drawback Scheme could be said to be profit derived from the business of an industrial undertaking eligible for deduction under section 80-IB of the Income-tax Act. Hence he submitted that this case law does not support the case of the Department. He further submitted that the very agreements under which the assessee has developed, operated and maintained the infrastructure facility at its own cost provided for revenue generation by the assessee by the display of commercial advertisement on the infrastructure facility developed by it. Learned counsel further submitted that the assessee was also not to charge any amount from the public users of the infrastructure facility developed by it. That the assessee was however permitted to use the infrastructure facility developed by it to raise revenue by display of commercial advertisements on it. That the provision in the agreements relating to generation of revenue in the manner aforesaid is inextricably and directly connected with the development, operation and maintenance of the infrastructure facility provided for in the agreements. Learned counsel further submitted that the assessee did not merely develop the infrastructure facility but the assessee also operated and maintained the infrastructure facility which activity are also covered by section 80-IA of the Act. In this regard learned counsel further referred to the decision of the hon'ble Calcutta High Court in the case of CIT v. Cement Mfg. Co. Ltd. [ITAT No. 130 of 2014, dated 15-1-2015]. In this case the hon'ble Calcutta High Court has upheld the Income-tax Appellate Tribunal's decision holding that the assessee was entitled to deduction under section 80-IC of the Act by treating the transport and interest subsidy as part of the business profit. Accordingly, learned counsel for the assessee submitted that the assessee's claim of deduction under section 80-IA of the Act cannot be disallowed.

10. Learned counsel for the assessee, on the other hand, submitted that the issue is squarely covered in favour of the assessee by the Tribunal's decision as mentioned above. In the said order the Tribunal had held as under :

"After hearing both sides, we find that the assessee has claimed deduction under section 80-IA on bus shelters treating the same as integral part of highway and development infrastructure. For the purpose of highway system the building of the bus shelters are functional necessity and these are inextricably connected with the infrastructure required for highway. Without bus shelters the smooth movement of the vehicles and the operation of the vehicles through the highway shall not be of desired level. Thus the bus shelters are functionally necessary part and parcel of the highway infrastructure. By holding so we find that the learned Commissioner of Income-tax (Appeals) has rightly allowed the appeal of the

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13. We have carefully considered the submissions and perused the records. We find that the issue on merits as to whether the assessee is entitled to deduction under

section 80-IA of the Act for construction of foot over-bridge as well as bus shelter is covered in favour of the assessee by the decision of the Tribunal and the hon'ble Calcutta High Court as referred to in the submissions of learned counsel for the assessee. The Tribunal in the assessee's own case as well as in the case of Selvel Advertising (P.) Ltd. (supra) has held that bus shelters and foot overbridges should be considered as part of the infrastructure facility for claiming deduction under section 80-IA of the Act. This issue was also supported by the decision of the hon'ble Calcutta High Court in the case of Selvel Advertising (P.) Ltd. (supra) wherein the hon'ble High Court has upheld the Income-tax Appellate Tribunal's decision quashing the revision order passed by the learned Commissioner of Income-tax under section 263 of the Act wherein bus shelters and foot overbridges were not to be considered as part of the infrastructure facility for claiming deduction under section 80-IA of the Act.

14. As regards the issue raised by the learned Departmental representative that the income which is the subject matter of claim of deduction under section 80-IA of the Act was not derived from the business of advertising of bus shelters and foot overbridges, we find that this is altogether a new issue which is not even the case of the Assessing Officer. The Assessing Officer has made the disallowance only on the ground that construction of bus shelter and foot overbridge cannot be treated as development of infrastructure facility. Hence they do not qualify for deduction under section 80-IA of the Act. This aspect of the Assessing Officer's disallowance has been duly overruled by the learned Commissioner of Income-tax (Appeals) as well as the Income-tax Appellate Tribunal. The same also draws support from the hon'ble Calcutta High Court decision in the case of *Selvel Advertising (P.) Ltd. (supra)*. In these cases it has been held that development of foot overbridges and bus shelters do qualify for deduction under section 80-IA of the Act on account of infrastructure development. When the Assessing Officer has not raised any issue as to whether the income of the assessee can be considered to be income derived from the industrial undertaking and the same was also not the subject-matter of consideration before the learned Commissioner of Income-tax (Appeals) nor any such ground has been raised before the Income-tax Appellate Tribunal, in our considered opinion the learned Departmental representative cannot now enlarge the scope of the Revenue's appeal before us.

15. In this regard we also draw support from the hon'ble Madhya Pradesh High Court exposition in the case of *Kamal Kishore & Co. v. CIT [1998] 232 ITR 668* for the following proposition (headnote) :

"Section 253 of the Income-tax Act, 1961, permits appeals to the Appellate Tribunal. Under sub-section (2) of this section, the Commissioner may, if he objects to any order, direct the Assessing Officer to appeal to the Appellate Tribunal against the order. It is thus clear that there has to be an appeal and there has to be a specific objection. Under Order 41, rule 2, of the Code of Civil Procedure also it is clear that the appellant shall not except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal."

16. On the basis of the above ratio the hon'ble High Court had held that admittedly the ground of status was not taken by the Department in terms of section 253(2) of the Act. No leave was obtained to urge the ground in regard to the status as

regards the liability to tax. The Tribunal erred in law in setting aside the findings given by the Appellate Assistant Commissioner that the assessee was a separate entity and the assessment made in the case of the assessee should be treated as substantive.

17. Thus from the above we hold that the issue which was not the basis of disallowance by the Assessing Officer and the same was not the subject-matter of consideration by the learned Commissioner of Income-tax (Appeals) and the same was also not the subject-matter of the ground of appeal taken before the Income-tax Appellate Tribunal the issue now being raised by the learned Departmental representative need not be adjudicated by us. Hence on the issue as to whether foot overbridges and bus shelters qualify for deduction of section 80-IA of the Act we hold that the learned Commissioner of Income-tax (Appeals) is correct in holding the assessee's entitlement for deduction under section 80-IA of the Act. Accordingly, this ground of appeal raised by the Revenue stands dismissed."

8. Since the facts of the assessee's case are similar to the one as decided by co-ordinate bench of the Tribunal, we are therefore respectfully following the same, set aside the order of Ld. CIT(A) and direct the AO to allow the deduction under section 80IA of the Act.

9. The issue raised in ground No.2 is against the part confirmation of disallowance on account of labour charges equal to 1% of the total purchases which comes to Rs.4,16,430/- by Ld. CIT(A) as against the disallowance on adhoc basis of Rs.7,25,120/- made by the AO on the ground that these expenses were incurred in cash whereas the issue raised in ground No.3, a without prejudice ground that the Ld. CIT(A) has erred in restricting the disallowance to 1% of the purchases for assessment year 2011-12 of Rs.4,16,43,098/- instead of 1% of the purchases for assessment year 2012-13 i.e. Rs.3,03,80,063/-.

10. The facts in brief are that the AO noticed from the profit & loss account that assessee has claimed the labour charges under the head direct expenses of Rs.3,03,80,063/-. The AO

noticed on the basis of bills and vouchers furnished by the assessee that there were no proper bills issued by third party and in some cases the expenses were incurred in cash. The AO calculated the amount of such cash expenses at Rs.7,25,120/- and added the same to the income of the assessee.

11. In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee by directing the AO to add 1% of the purchases, however, instead of taking the figure for assessment year 2012-13 the ld CIT(A) wrongly took the figure of purchases for assessment year 2011-12 and thus an addition of Rs.4,16,430/- was sustained. Hence, the assessee is in appeal.

12. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that assessee has debited a labour charge of Rs.3,03,80,063/- under the head "Labour charges" and admittedly on random basis the AO found that expenses to the tune of Rs.7,25,120/- incurred in cash for which the third party bills were not available and the same were added to the income of the assessee. The Ld. CIT(A) reduced the disallowance to Rs.4,16,430/- by applying 1% on Rs.4,16,43,098/- by wrongly taking the labour charges at Rs.4,16,43,098/-. Thus there is an apparent mistake in the order of Ld. CIT(A) the labour charges debited to the profit & loss account are Rs.3,03,80,063/-. The Ld. CIT(A) should have done 1% of Rs.3,03,80,063/-. We observe that the AO as well as the Ld. CIT(A) has made the disallowance on adhoc basis. We are of the view that ends of justice would be met if a reasonable disallowance is made on this account. Accordingly, we set aside the order of Ld. CIT(A)

and direct the AO to disallow a sum of Rs.1,00,000/-. Ground no. 2 is partly allowed and ground no. 3 is without prejudice to ground 2 and therefore need not be adjudicated.

13. The issue raised in ground No.3 is against the confirmation of addition of Rs.34,541/- by Ld. CIT(A) as made by the AO under section 14A read with rule 8D.

14. The AO observed that assessee has earned tax free income, however, no corresponding disallowance was made. Accordingly, the AO invoked rule 8D and calculated the disallowance at Rs.34,541/- comprising Rs.18,460/- under rule 8D(ii) and Rs.16,125/- under rule 8D(iii) which was confirmed by the Ld. CIT(A).

15. After hearing both the parties and perusing the material on record, we find merit in the contentions of the Ld. A.R. that the disallowance under rule 8D2(iii) was wrongly made at 1.5% of the average investment instead of .5%. Therefore, the same is required to be rectified. Accordingly, we set aside the order of Ld. CIT(A) on this issue and direct the AO to make a disallowance at .5% of average investment. Needless to say that disallowance computed under rule 8D(ii) is correct. Accordingly, we direct the AO to delete the disallowance to the extent of Rs.10,750/-. Ground is partly allowed.

ITA No.742/Mum/2018 AY 2011-12

16. The issue raised in ground no. 2 is similar to one as decided by us in ITA No. 743/Mum/2018 AY 2012-13. Therefore our decision on ground no. 1 ITA No. 743/Mum/2018 would,

mutatis mutandis , appeal to ground no. 2 of this appeal as well. Consequently the ground no. 2 of assessee's appeal is allowed.

17. The issue raised in ground no. 3 and 4 is similar to one as decided by us in ITA No. 743/Mum/2018 AY 2012-13. Our findings in ITA No. 743/Mum/2018 would, apply to these grounds as well. Accordingly ground no. 3 is partly allowed whereas ground no. 4 is not be adjudicated. The AO is directed to disallow and all a sum of Rs.1,25,000/-.

18. The issue raised in ground no. 4 is similar to one as decided by us in ITA No. 743/Mum/2018 AY 2012-13 supra wherein we have partly allowed the ground by directing the AO to make addition under rule 8D(2)(iii) by applying 0.5% on the average investments. Our findings would, mutatis mutandis, apply to ground no. 4 of this appeal. The AO id directed to make addition under rule 8D(2)(iii) @0.5% of the average investments. Consequently the assessee gets relief of Rs.18,500/-. The ground is partly allowed.

Ground no. 1 is not pressed at the time of hearing and therefore dismissed as not pressed.

19. In the result, both the appeals of the assessee are partly allowed.

Order pronounced in the open court on 08.01.2021.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 08.01.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.