

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष  
**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND**  
**SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.: **1985 & 1986/CHNY/2013**  
निर्धारण वर्ष /Assessment Years: 2009-10 & 2010-11

**The DCIT,**  
Circle - XIII,  
Chennai – 34.

(अपीलार्थी/Appellant)

**M/s. Eshwarnath**  
v. **Construction,**  
No.28, Jai Vignesh Buildings,  
Perambur High Road,  
Chennai – 600 012.

**PAN: AABFE1141M**  
(प्रत्यर्थी/Respondent)

&

आयकर अपील सं./ITA No.: **1737/CHNY/2018**  
निर्धारण वर्ष /Assessment Year: 2011-12

**The ACIT,**  
Non-Corporate Circle 10(1),  
Chennai – 34.

(अपीलार्थी/Appellant)

**M/s. Eshwarnath**  
v. **Construction,**  
No.28, Jai Vignesh Buildings,  
Perambur High Road,  
Chennai – 600 012.

**PAN: AABFE1141M**  
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by  
प्रत्यर्थी की ओर से/Respondent by

: Shri P. Sajit Kumar, JCIT  
: Shri D. Anand, Advocate

सुनवाई की तारीख/Date of Hearing

: 15.02.2022

घोषणा की तारीख/Date of Pronouncement

: 22.02.2022

**आदेश / O R D E R****PER MAHAVIR SINGH, VP:**

These two appeals by the Revenue in ITA Nos.1985 & 1986/Chny/2013 for the assessment years 2009-10 & 2010-11 are arising out of the common order of Commissioner of Income Tax (Appeals)-XII, Chennai in ITA Nos.208 & 209/2012-13, vide order dated 14.03.2013. The assessments were framed in both the years by the ACIT, Circle XIII, Chennai for the assessment years 2009-10 & 2010-11 u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide orders dated 09.12.2011 & 29.01.2013 respectively. The appeal by the Revenue in ITA Nos.1737/Chny/2018 is arising out of the order of Commissioner of Income Tax (Appeals)-12, Chennai in ITA No.214/CIT(A)-12/2016-17 vide order dated 16.03.2018. The assessment was framed by the ACIT, Non-Corporate Circle 10(1), Chennai for the assessment year 2011-12 u/s.143(3) r.w.s. 147 of the Act, vide order dated 31.08.2016.

2. At the outset, it is noticed that the appeals in ITA No.1985 & 1986/Chny/2013 for assessment years 2009-10 & 2010-11 are

time barred by 136 days. The Revenue has filed condonation petition along with affidavit stating the reason that the order of CIT(A)-XII, Chennai was received on 29.04.2013 and accordingly appeal was filed on or before 28.06.2013, which is within time limit. It was submitted that combined appeal for all three years were filed on 27.06.2013 as the order of CIT(A) for all three assessment years was a combined order. It was stated by the Id. Senior DR that subsequently when the office of Senior Authorized Representative of ITAT, Chennai vide office letter No.ITA 1444/13 dated 30.10.2013 informed the AO to file separate appeals for each of the years, since filing of one combine appeal for three years is procedurally incorrect. Accordingly separate appeals were file for these two assessment years i.e., 2009-10 & 2010-11 on 11.11.2013 with a delay of 136 days. Hence, the Id.Senior DR stated that the AO has filed affidavit qua this fact which is placed on record and requested for condonation of delay. When these facts were put to Id.counsel for the assessee, he has not objected for condonation of delay.

3. Having heard rival contentions and going through the facts of the case, we noticed that the Revenue in all the three assessment years i.e., 2007-08, 2008-09 & 2009-10 filed one appeal for the

reason that the order of CIT(A) for all the three years was a combined order. Subsequently, on advice of Senior Authorized Representative, appeals for all these three assessment years were filed with a delay of 136 days along with condonation petition. We find cause as reasonable and accordingly condoned the delay and admit appeal for both the years.

4. When these appeals were called for hearing, Id. Senior DR stated that the facts and circumstances and issue is exactly identical in all the years. The Id.senior DR took us through the grounds raised which are almost identically worded except the figures and reliance of case. As the facts are identical and issue is same, we will take the facts from assessment year 2012-13 in ITA No.1737/Chny/2018. The relevant ground reads as under:-

1. The order of the learned CIT(A) is erroneous in law and opposed to the facts and circumstances of the case.

2.1 The learned CIT(A) erred in directing the Assessing Officer to allow the assessee's appeal holding that the assessee is eligible for claiming deduction u/s 80IA(4)(i) of Rs. Rs.2,94,65,064/-.

2.2 The Ld.CIT(A) failed to appreciate the fact that the assessee is only a work contractor and merely executing the job work assigned by the Railway Authorities through contract agreement and hence cannot be construed as developer of infrastructure.

2.3 The learned CIT(A) has failed to consider that Explanation to Section 80IA inserted in Finance Act, 2009 with effect from 1.4.2000 has

specifically clarified that sub-section (4) of Section 80IA is not applicable to business in the nature of works contract awarded by any person including Central or State Government.

2.4 The learned CIT(A) ought to have considered the decision of the Hon'ble Tribunal, in this case in ITA No.185/Mds/2012 dated 15.01.2013, has decided similar issue in favour of the Department holding that the assessee is a Firm and hence not eligible for claiming deduction u/s 80IA(4)(i)(a) and the section is applicable only for companies registered in India.

2.5 The Id.CIT(A) failed to note that in the above circumstances, the assessee cannot be considered to have satisfied the conditions prescribed in Section 80IA.

5. Brief facts are that the assessee is a contractor for Indian Railways and carried on the work of construction of rail over bridges (ROB), foot over bridges (FOB), construction of new railway station buildings, etc. The assessee stated before the AO as well as before the CIT(A) that the work executed by it are in the capacity of a developer and not as a contractor. The assessee relied on the following:-

- 1) CBDT Circular No.4/2010 (F.No.178/14/2010-ITA.1) dated 18.05.2010
- 2) Case law of Patel Engineering Ltd vs. DCIT reported in 94 ITJ(Mum) 646 and ACIT vs. Bharat Udyog Ltd., reported in 123 ITJ 689.

- 3) Decision of ITAT in the case of Mahalaxmi Construction by following the decision of Third Member Bench in the case of M/s. B.T.Patil & Sons Belgaum Constructions P. Ltd., vs. ACIT, 126 ITJ (Mum) (TM) 577.
- 4) Decision of ITAT, Hyderabad in the case of Sushee Infra Pvt. Ltd in ITA No.1826/Hyd/2014 dated 04.12.2015.
- 5) Decision of ITAT, Chennai in the case of R.R. Constructions in ITA No.2061/Mds/2010, dated 03.10.2011.

The assessee claimed deduction u/s.80IA(4) of the Act for creating infrastructure activity and eligible for tax concession. The AO noted that as per the provisions of section 80IA of the Act, only the enterprises which are engaged in the activity of development, operating and maintaining or developing, operating and maintaining any infrastructure facility are eligible for deduction u/s.80IA of the Act. He also noted that as per the explanation of section 80IA(4) introduced by Finance Act (No.2) 2009, w.e.f.01.04.2000, it is hereby declared that nothing contained this section shall apply in relation to a business reference sub section (4) which is in the nature of works contract awarded by any person (including the central and state government) and executed by the undertaking or enterprising referred to in sub-section (1).

Accordingly, the AO disallowed the claim of deduction u/s.80IA(4) of the Act but the CIT(A) relying on the above cited case laws allowed the claim of the assessee. Aggrieved, now Revenue is in appeal before the Tribunal.

6. At the outset, the Id.counsel for the assessee as well as the Id. Senior DR stated that the issue is squarely covered in favour of Revenue and against the assessee by the Tribunal decision in assessee's own case for the assessment year 2008-09 in ITA No.185/Chny/2012, order dated 15.01.2013, wherein the Tribunal has considered this issue in detail vide para 8 & 9, which reads as under:-

“8. We have given our thoughtful consideration to the submissions of both parties and also gone through the findings of the Assessing Officer and CIT(A). The voluminous paper book referred to by the assessee has also been perused. The undisputed facts of the case are that the assessee's claim raised under section 80IA of the “Act” has been negated by the Assessing Officer as well as the CIT(A) on the ground that it is a contractor and not a developer. At this stage, we deem it appropriate to reproduce hereunder section 80IA of the “Act” providing deduction in respect of profits and gains from industrial undertaking or enterprises engaged in infrastructure development which reads as follows:-

*80IA. (1)Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred*

*per cent of the profits and gains derived from such business for ten consecutive assessment years.*

*(2) .....*

*(2A) .....*

*(3) .....*

*(4) This section applies to—*

*(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;*

*(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 a 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.*

*Explanation.—For the purposes of this clause, “infrastructure facility” means—*

*(a) a road including toll road, a bridge or a rail system;*

*(b) a highway project including housing or other activities being an integral part of the highway project;*

*(c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;*

*(d) a port, airport, inland waterway, inland port or navigational channel in the sea;*

(5) .....

(13) .....

*\*Explanation. - For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).*

*\*It introduced by Finance (No.2) Act, 2009 w.r.e.f. 1.4.2000*

A perusal of the statutory provisions makes it clear that it does not provide a blanket deduction i.e. in order to succeed in a claim of deduction; the concerned assessee has to derive profits and gains from any business referred to in sub-section 4. Further, sub-section 4 prescribes applicability of clause i.e. the case in which the deduction provision would apply. It is in this sub-section that the legislature has enumerated the nature of the undertakings, their activities in contributing raising of infrastructure. Further, in the explanation attached to the sub-section, the legislature has also entrusted the meaning of the infrastructure facilities. In our opinion, an assessee while claiming deduction has to satisfy all conditions in sub-section 4(1)(a) or (b) or (c). It is mandatory for the assessee to first satisfy subsection clause i(a), then (b) then (c), then proviso and so on. In case the concerned assessee fails in any one of the clauses, even if it satisfies the other part of the sub-section, the claim has to be rejected. Now we proceed to decide as to whether the assessee firm satisfies sub-section 4(i) of the "Act" or not. For the said sub-section, a reading of the provision makes it unambiguous that the concerned claimant has to be an enterprises carrying on the business of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility and it has to be owned by a consortium of such company or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act. Admittedly, the assessee is a partnership firm. As we notice from the relevant statutory provision, the enterprise in the nature of firm nowhere finds mention in the mandate of the legislature. Although the assessee has emphasized from the definition of the word 'body' in the Law Lexicon which reads as follows:

“Statutory definition, includes partnership, Financial Services and Markets Act, 2000 (c.8), S. 367(2) (Stroud, 6th Edn., 2000, Supplement, 2003).

It also includes group of bodies, partnership of enterprise card on by one or more persons or bodies and a body which is substantially the same at or successor, to, another body, Government Resources and Accounts Act, 2000 (c.20), S. 17(7) (Stroud, 6th Edn., 2000, Supplement, 2003).

The main-central or principal part [Art. 110 (2), Const.]; physical or material frame of a man or animal; gang of thieves etc.”

In our opinion, the said definition being a general preposition does not help the assessee's case. It is a trite preposition of law while interpreting a statute and more so a fiscal statute, neither the judicial forum concerned can insert its own words nor it can take away any from the statute. As it is seen, the earlier portion of the statutory provision prescribes a company registered in India or a consortium of such companies or by an authority or corporation or any other body established or constituted and so on. In our view, the latter part is liable to be read in the light of the earlier part by following the principles of *ejusdem generis*. The vehement contention of the assessee is that it is also a body established or constituted under a Central Act as it is governed by Partnership Act, cannot be accepted for the reason that under the provisions of Partnership Act a firm is not created i.e. it is not a creation of statute, but it is a body of individual regulated by the statute namely Partnership Act. Hence, we hold that the assessee fails to satisfy the applicability clause of the provision as envisaged under section 80IA(4)(i) of the “Act”.

9. So far as catena of the judgments submitted by the AR of the assessee, we notice that they only pertain to section 80IA(4)(i)(b) i.e. regarding the issue of contractor viz-a-vis developer. Hence, we do not deem it appropriate to decide on the said issue since the assessee does not fulfill the condition enumerated in the first part of the statutory provision. We make it clear that although the issue adjudicated by us has not been looked into by the Assessing Officer or CIT(A), but in the larger interest of the justice and in view of the fact that before availing deduction under section 80IA, all the necessary conditions have to be satisfied we have proceeded to examine the applicability of the deduction provision contained in section 80IA(4)(i) of the “Act”.

7. In view of the above case law, the Id.Senior DR stated that the Tribunal 'B' Bench, Chennai vide ITA No.185/Chny/2012 examined the eligibility of the assessee's claim of deduction u/s.80IA(4)(i) of the Act and vide para 8 of the order dated 15.01.2013 held that the assessee failed to satisfy the applicability clause u/s.80IA(4)(i) of the Act, for the reason that the assessee is only a partnership firm. He further argued that even on merits the assessee is found to have taken part in tender process floated for rate contract and it is evident from the tender award documents forming part of paper-book submitted by the counsel of the assessee on 1<sup>st</sup> November, 2012 and it is evident from the award of contract that the assessee is a works contractor, attracting the explanation inserted by the Finance Act 2009, w.e.f. 01.04.2000, below the sub-section 13 of section 80IA. The Id.Senior DR further submitted that the assessee being a partnership firm in the relevant assessment years is legally not eligible to claim deduction u/s.80IA(4)(i) and also, even on merit, the assessee is found to have executed works contract attracting the explanation to sub-section 13 of 80IA. Therefore, the appeal of the Department may be allowed. The Id.counsel for the assessee could not controvert the above submissions. As the issue is squarely covered in assessee's own case in ITA No.

185/Chny/2012, we consistently following the same allow these three appeals of the Revenue.

8. In the result, all the three appeals filed by the Revenue are allowed.

Order pronounced in the court on 22<sup>nd</sup> February, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

**(MANOJ KUMAR AGGARWAL)**

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

**(MAHAVIR SINGH)**

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 22<sup>nd</sup> February, 2022

**RSR**

आदेश की प्रतिलिपि अग्रहित/Copy to:

- |                        |                          |                              |
|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT    | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF.            |