

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.3359 & 3360/Bang/2018
Assessment Year : 2010-11 & 2011-12

M/s. Yojaka (India) Pvt. Ltd. Trade Centre, NH-17 Kottara Chowki Mangalore PAN NO : AAACY1852D	Vs.	ACIT Circle-1(1) Mangalore
APPELLANT		RESPONDENT

Appellant by	:	Smt. M.R. Vanaja, A.R.
Respondent by	:	Shri Sankar Ganesh K., D.R.

Date of Hearing	:	24.02.2022
Date of Pronouncement	:	05.05.2022

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed these two appeals challenging the common order dated 31.3.2015 passed by Ld CIT(A), Mangaluru and they relate to the assessment years 2010-11 and 2011-12. Both the appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. Both the appeals are barred by limitation by 1259 days. The assessee has filed petition requesting the bench to condone the delay. It is submitted therein that the orders passed by Ld CIT(A) was handed over to its auditor and he did not advise to file appeal. When

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the assessee approached the present advocate, she advised to file appeals and accordingly, the present appeals have been filed before the Tribunal. Accordingly it is submitted that the appeals could not be filed in time for bonafide reasons beyond the control of the assessee and it was unintentional. Accordingly, it is prayed that the delay in filing the appeals may be condoned.

3. We heard Ld DR on this preliminary issue and perused the record. Having regard to the submissions made in the petition, we are of the view that there was reasonable cause for the assessee in not filing appeals in time. Accordingly, we condone the delay and admit both the appeals for hearing.

4. The solitary issue urged in both these appeals relate to the eligibility of the assessee to claim deduction u/s 80IA(4) of the Act. The assessee claimed deduction of Rs.79,65,440/- and Rs.7,68,402/- u/s 80IA of the Act respectively for assessment years 2010-11 and 2011-12. In support of the claim, the assessee submitted as under before the AO:-

(a) Assessment year 2010-11:-

“During the year 2009-10 we have undertaken infrastructure development work in Kerala and Gujarat. Amount of receipt is Rs.6,69,34,132/-. The profit earned from such work is Rs.79,65,440/-.

These projects are in nature of infrastructure development and include work such as – “Tapi river bank Protection work of Surath Municipal Corporation and the work of construction of permanent banks of Champakara Canal and Udyogamandal Canal in NW-3 Kerala. It is a project related to inland water way and allotted by Inland Waterways Authority of India. As it satisfies the

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requirements for explanation of infrastructure development we are claiming deductions under section 80IA”.

(b) Assessment year 2011-12

“During the year 2010-11 they have worked for Surat Municipal Corporation and Inland Waterways Authority of India. Amount of receipt was Rs.1,62,22,140/-. This was in the nature of infrastructure development and includes works such as Tapi river bank protection work at Barimata, Surat. As it satisfies the requirements of explanation of infrastructure development therefore we are claiming for deduction under section 80IA”.

5. The assessee had carried out river bank construction works and claimed the same as infrastructure facility covered by sec.80IA of the Act. The AO did not accept the contentions of the Assessee. He held that the "project related to inland water ways allotted by Inland water authority of India does not by itself constitute "development of inland waterways" within the meaning of clause (c) to the Explanation to sub-section (4) of Section 80IA(4). The AO held that there is no element of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining of any infrastructure facility in the work carried out by the assessee. The AO held that the assessee has only executed works contract and hence the assessee is not eligible for deduction u/s 80IA of the Act in view of the specific Explanation inserted at the end of sec. 80IA by Finance Act, 2000. The AO also noticed that identical claim for deduction u/s 80IA made by the assessee in AY 2005-06 to 2009-10 has been rejected by the AO and it was confirmed by Ld CIT(A) also. Accordingly, the AO rejected the claim for deduction u/s 80IA in both the years under consideration.

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6. The Ld CIT(A) noticed that an identical issue was considered by the Tribunal in the assessee's own case in AY 2005-06 & 2006-07 in ITA Nos. 30 & 31/B/2010 dated 25.7.2012, wherein the Hon'ble Tribunal confirmed the disallowance of deduction u/s 80IA of the Act. Following the order of the Tribunal, the Ld CIT(A) confirmed the action of AO in disallowing the claim for deduction u/s 80IA in both the years under consideration. Aggrieved, the assessee has filed these two appeals before us.

7. We heard the parties and perused the record. The Ld D.R brought to our notice that the orders passed by the Tribunal in the assessee's own case in AY 2005-06 and 2006-07 has since been upheld by the Hon'ble High Court of Karnataka in ITA No.428 - 429/2012 dated 22nd April 2013. On the contrary, the Ld A.R submitted that the incentive provisions should be interpreted liberally as held by Hon'ble Supreme Court in the case of Bajaj Tempo Ltd vs. CIT (196 ITR pg.188). Accordingly, she prayed that the Tribunal may allow the appeals of the assessee.

8. There is no dispute with regard to the fact that the issue contested in both the appeals have since been decided against the assessee by the co-ordinate bench in the assessee's own case in AY 2005-06 & 2006-07 and the said order of the Tribunal has since been upheld by the Hon'ble jurisdictional High Court. The decision rendered by the Tribunal in AT 2005-06 & 2006-07 are extracted below, for the sake of convenience: -

"5.0 We have heard both parties, carefully perused and considered the material on record viz. the orders of the authorities below, the written submissions made and the judicial decisions cited and placed reliance on. It is a matter of record that the assessee in the relevant period had executed the following works -

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i) *Refurbishment/repairs i.e. rip-rap masonry on the permanent banks of the Champakara and Udyog Mandal Canals in Kerala in pursuance of a works contract with the Developer viz. IWAI under the Ministry of Shipping & Transport, Govt. of India.*

ii) *Protection work for the Tapi Riverbank under the authority of the Surat Municipal Corporation, Gujarat. The assessee claimed a deduction under section 80IA of the Act thereon, on the ground that it had undertaken the construction and maintenance of an infrastructure facility.*

5.1 Section 80IA(i) reads as under :

"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."

It is the claim of the assessee that it is eligible for deduction under section 80IA on the ground that its business activity as per sub-section (4) thereof is the developing, operating and maintaining of infrastructure facility namely, the repair and maintenance ITA No. 30 & 31/Bang/2010 of protection walls for the two canals in Kerala and the riverbank in Gujarat. We have perused pages 1 to 6 of the paper book filed by the learned counsel for the assessee on 8.6.2012 and find that the description of the work executed by the assessee in the relevant period is certainly not the development of any infrastructure as the Champakara and Udyogmandal canals in Kerala were constructed/developed decades ago. What work the assessee executed in respect of these two canals and the Tapi riverbank viz. rip-rap masonry for protection of the canal bank and river bank can at best be work which is a sub-activity in the category of repairs and maintenance thereof rather than development of an infrastructure facility namely, inland waterways which has been done by IWAI. We are of the considered view that the assessee

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executed works contracts on behalf of the concerned Government bodies and there is certainly no element of developing or operating and maintaining or developing, operating and maintaining of any infrastructure facility as envisaged in clause (c) to the Explanation to sub-section(4) of section 80IA of the Act.

5.2 The Explanation to section 80IA inserted by Finance Act, 2007, with retrospective effect from 1.4.2000 reads as under :

"For removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a work contract entered into with the undertaking or enterprise as the case may be."

The Explanation (supra) inserted in the Act is clarificatory in nature and clearly spells out the legislative intent that the benefit of deduction under section 80IA of the Act was not to be granted or extended to work contractors as in the instant case of the assessee.

5.3 The assessee has placed reliance on the following judicial decisions in support of the proposition that it is entitled to claim the benefit of deduction under section 80IA of the Act.

i) CIT Vs. ABG Heavy Industries Ltd (322 ITR 323) (Bom)

ii) ACIT Vs. JSR Construction P. Ltd & Others of the co-ordinate bench of this Tribunal in ITA No.898/Bang/2009 dt.29.3.2011.

We have perused both these cited decisions (supra) and, with due respect, we find that the facts of these cases are distinct and different from those of the instant case and therefore would not come to its rescue.

5.3.1 In the case of ABJ Heavy Industries Ltd & Others (supra), the assessee entered into a contract for the installation, testing, commissioning and maintenance of container handling cranes at the container terminal of Jawaharlal Nehru Port Trust (JNPT) in openable condition on 'BOLT' basis. This work was certified by JNPT to be an integral part of setting up of the port which by definition was included in the purview of the expression infrastructure facility. The Mumbai Tribunal and the Hon'ble High Court of Bombay held that the assessee's had developed the infrastructure facility on 'BOLT' basis and was therefore entitled to deduction under section 80IA. In

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the instant case of the assessee, the facts are clearly different. No infrastructure was developed by the assessee. Rather, it only carried out the works contract of refurbishing/repairs and protection of the permanent walls of the existing canals and riverbanks under works contract from the IWAI and Govt. of Gujarat. Therefore, we are of the view that the facts of the cited case are different and the finding thereon would not come to the assessee's rescue.

5.3.2 In the case of JSR Constructions P. Ltd. (supra), the facts were that the assessee was a Member of a two entity consortium which was awarded a contract by NHAI. The entire work was executed by the assessee on a back to back basis with all the terms and conditions thereto. The entire contract amount of over Rs.100 Crores. The Tribunal found that the assessee had taken the entire risk for the setting up of the infrastructure project by investing the entire capital and so was entitled to receive the entire contract receipts. It, therefore, held that the assessee was entitled for deduction of 80IA of the Act as it was involved in setting up infrastructure in the country. In the instant case of the assessee, the facts are starkly different. The assessee, in the instant case was only involved in works contracts given to it by the developers for refurbishing/repairing the protection walls of the canals and riverbanks and not in the development of any infrastructure facility as claimed. Thus, we find that the facts of the cited case being different and distinguishable from that of the instant case, the same would not come to the aid of the assessee.

5.4 The learned CIT(A) in his order after detailed examination of the assessee's claim at paras 3 to 20 thereof held that the assessee was not entitled to be allowed deduction under section 80IA of the Act in the facts and circumstances of the case as also discussed in paras 4.1 to 5.3 above. In doing so, he has followed and applied the decision of the Special Bench of the Hon'ble ITAT, Mumbai in the case of M/s. B.T. Patil & Sons, Belgaum Construction Pvt Ltd. Vs. ACIT in ITA Nos.1408 & 1409/PN/2003 dt.26.10.2009. In this case, the Special Bench of the Tribunal held that the insertion and substitution of the Explanation to section 80IA of the Act with

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retrospective effect from 1.4.2000 was only in order to clarify that the deduction. 80IA of the Act would not be allowed in relation to a business in the nature of works contracts. The Special Bench ITA No. 30 & 31/Bang/2010 observed that the claim of the assessee for deduction. 80IA failed because it was neither a developer of infrastructure, nor did it develop, maintain and operate infrastructure facility. It was also clarified that the deduction under section 80IA of the Act would not be allowable to a person who executes a works contract entered into with the undertaking or enterprise who developed the infrastructure facility. On careful consideration, we are of the considered view that the facts and circumstances of the above cited case are identical to those of the assessee in the present case on hand and therefore it is clear that the assessee is not eligible to be allowed deduction under section 80IA of the Act. In the course of arguments, the learned Departmental Representative had cited and placed reliance on the decision of the Chennai Tribunal in the case of ACIT Vs. Indwel Linings P. Ltd. (2009) 313 ITR (AT) 118. We have perused the cited decision and find that the assessee in that case we engaged in undertaking works for in situ lining for water supply project and anti-corrosive lining and had claimed deduction under section 80IA of the Act. The Tribunal after examining the facts of the case held that the benefit of deduction under section 80IA was available only to a developer as it was a condition precedent for grant of the benefit of this section that the undertaking or enterprise must derive income from carrying on the business of developing an infrastructure facility. The Tribunal held that the assessee had entered into a contract for executing works contract and therefore the benefit of deduction under section 80IA would not be available to it. We find that the facts of the cited case are identical to that of the present case and are therefore of the view that the assessee is not eligible for being allowed deduction under section 80IA of the Act.

5.5 From the discussion in paras 5 to 5.4 of this order (supra), it is clear that the judicial decisions cited by the assessee for claiming deduction under section 80IA are clearly distinguishable and would not buttress its claim for

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the said deduction. Rather, we are of the considered view that the judicial decisions and relied on by the learned DR and the learned CIT(A) viz. (i) Indwel Linings P. Ltd. (supra) and (ii) B.T. Patil & Sons, Belgaum (supra) are factually identical to that of the present case. We, therefore, respectfully following the ratio laid down in these two decisions hold that the assessee is a mere contractor executing civil works contracts for an infrastructure undertaking/enterprise and is therefore not eligible to be allowed deduction under section 80IA of the Act. The learned CIT(A)'s order on this issue is upheld and consequently the grounds of appeal raised by the assessee are dismissed."

9. It was noticed earlier that the above said decision of the Tribunal has since been upheld by the jurisdictional Hon'ble Karnataka High Court and the operative portion of the order passed by the Hon'ble High court is extracted below:-

"5. We do not see any merit in the said contention. All the three fact finding authorities, on a careful examination of the terms of the contract and taking note of the nature of the work executed by the assessee have held that it is a Works' Contract. It is not a case where the assessee has made any investment in an infrastructure project. The authority owning the infrastructure project has entered into a contract with the assessee for repair and maintenance for a period of three years. In fact terms of the agreement shows that the assessee has to furnish the Bank Guarantee and the assessee has been paid mobilization advance and therefore, it is not a case of assessee investing its money in development of infrastructure or operating and maintaining an infrastructure, which is already developed or developing and maintaining of any infrastructure development. It is an agreement entered into to effect repairs to infrastructure by construction of permanent bank protection measures to Udyog Mandal canal and Champakara canal and maintaining the same for a period of three years. Therefore, it is a works contract as held by the three authorities. We do not see any merit in these appeals. No substantial question of law also arises for consideration in these appeals. Accordingly, appeals are dismissed."

10. It was not shown to us that the facts prevailing in the years under consideration are different. Since the Ld CIT(A) has passed the orders following the decision rendered by the Tribunal, which has since been upheld by the Hon'ble High Court of Karnataka and since the order passed by the jurisdictional High Court is binding on us,

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we do not find it necessary to interfere with the orders passed by Ld CIT(A) on this issue in both the years.

11. In the result, both the appeals of the assessee are dismissed.

Order pronounced in the open court on 5th May, 2022.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 5th May, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.