

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI S.S.VISWANETHRA RAVI, JM
AND DR. DIPAK P. RIPOTE, AM

आयकरअपीलसं. / ITA No.1836 /PUN/2018

निर्धारणवर्ष / Assessment Year: 2010-11

The Assistant Commissioner of Income Tax, Circle-3, Pune.	Vs	Rohan & Rajdeep Infrastructure, CST No.2254/1, Modi Baug, Commercial Building, Ganesh Khind Road, Shivaji Nagar, Pune – 411016. PAN: AAFFR 9455 F
Appellant/ Assessee		Respondent /Revenue

Cross Objection No.16/PUN/2021

(arising out of ITA No.1836/PUN/2018)

निर्धारणवर्ष / Assessment Year: 2010-11

Rohan & Rajdeep Infrastructure, CTS No.2254, 1 Modibaug, Commercial Complex Building, Ganeshkhind Road, Shivaji Nagar, Pune – 411016. PAN: AAFFR 9455 F	Vs	The Assistant Commissioner of Income Tax, Circle-3, Pune.
Appellant/ Assessee		Respondent /Revenue

आयकरअपीलसं. / ITA No. 1837/PUN/2018

निर्धारणवर्ष / Assessment Year: 2014-15

The Assistant Commissioner of Income Tax, Circle-3, Pune.	Vs	Rohan & Rajdeep Infrastructure, Office No.8 & 9, Pradeep Chambers, S.No.813, Bhan darker Road, Maharashtra – 411004. PAN: AAFFR 9455 F
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Nikhil Pathak - AR
Revenue by	Shri M.Jasnani - DR
Date of hearing	12/04/2022
Date of pronouncement	13/06/2022

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

The set of Three Appeals consisting two appeals by the Revenue and Cross Objection therein by the Assessee for A.Y. 2010-11 and remaining appeal by the Revenue for A.Y. 2014-15 are directed against the separate

orders of Id.Commissioner of Income Tax(Appeals), Pune-3, Pune dated 10.09.2018 and 11.09.2018 for the Assessment Years 2010-11 and 2014-15 respectively. The Revenue raised the following grounds of appeal for the A.Y. 2010-11:

“1. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in allowing the assessee’s claim of deduction u/s.80IA(4) of the I.T.Act, as the section 80IA does not provide deduction to assessees registered as “Firm” and instead should have confirmed the disallowance made in the assessment on this issue.

2. The appellant prays that the Order of the Ld.CIT(A) be held to be bad in law and quashed and that of the Assessing Officer be restored.

The appellant prays to be allowed to add, amend, modify, rectify, delete or raise any grounds of appeal during the course of appellate proceedings.

2. In Cross Objection appeal, the Assessee raised the following grounds of appeal for the Assessment Year 2010-11:

“1. The Assessee submits that the re-opening u/s 148 is bad in law and accordingly, the reasst. Order passed u/s 147 be declared null and void.

2. The assessee submits that the reopening is bad in law on account of the following reasons –

a. The asst. u/s. 143(3) was completed and the reopening is beyond 4 years from the end of the relevant asst. Year and since all the material facts were duly submitted by the assessee in the course of original asst. Proceedings, the reopening is not valid since there is no failure on the part of the assessee to furnish the material facts.

b. The reopening is made on a mere change of opinion and hence, the same was not justified at all.

3. The respondent craves leave to add, alter, amend or delete any of the above cross objections.”

3. The Revenue raised the following grounds of appeal for the Assessment Year 2014-15:

“1. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in allowing the assessee’s claim of deduction u/s.80IA(4) of the I.T.Act, as the section 80IA does not provide deduction to assessee registered as “Firm” and instead should have confirmed the disallowance made in the assessment on this issue.

2. The appellant prays that the Order of the Ld.CIT(A) be held to be bad in law and quashed and that of the Assessing Officer be restored.

The appellant prays to be allowed to add, amend, modify, rectify, delete or raise any grounds of appeal during the course of appellate proceedings.

4. Brief facts of the case are that the assessee is a Partnership firm having following partners:

Rohan Builders (India) Pvt Ltd	50 % share
Rajdeep Buildcon Pvt Ltd	40%
Rajdeep Road developers Pvt Ltd	10%

4.1 During the year assessee had claimed deduction u/s 80IA(4) of the Act.

The AO denied the benefit only on one ground that assessee is a firm , where as, 80IA(4) (i)(a) specifies that it is applicable only for a company or consortium of company.

4.2 The CIT(A) allowed the appeal of the assessee. The Id.CIT(A) has held in para 5.3.3 and para 5.3.4. as under :

“5.3.3 The appellant has heavily relied: upon the order of the Hon'ble ITAT in the appellant's own case for AY 2012-13 passed in the appeal filed by the appellant against the order u/s 263 of the Act. In his order in ITA No.633/PUN/2017 dated 23-02-2018, the Hon'ble ITAT has given the following finding:

"16. On the issue of assessee not being eligible for deduction u/s 80IA(4) as it being a partnership firm is concerned, it is an undisputed fact that the assessee is a partnership firm consisting of 3 companies namely Rohan Builders (India) Pvt. Ltd, Rajdeep Buildcon Pvt., Ltd and Rajdeep Road Developers Pvt., Ltd with a profit sharing ratio of 50:40:10 respectively. It is also a fact that in the case of assessee apart from the aforesaid 3 partners, there are no other non-corporate entities, who are partners. It is also a fact that the partnership firm came into existence on 11.04.2001 and the same partners continued in the year under consideration without any change in the constitution. It is a fact that according to provisions of Sec -. 80IA(4)(i)(a), the section applies to an enterprise which is a company registered in India or a consortium of companies or by an authority in a board or a corporation or any other

body established or constituted under any Central or State Act. It is also a fact that the word "consortium" used in the provision has not been defined in the Income Tax Act. As per the Merriam Webster dictionary, the word "consortium" means an agreement, combination, or group (as of companies) formed to undertake an enterprise beyond the resources of any one member". As per the Collins English Dictionary, a "Consortium" is a group of people or firms who have agreed to cooperate with each other". We find that the Hon'ble Madhya Pradesh High Court in the case of Org Informatics (supra) has observed that a consortium is akin to a partnership where each partner is liable for action of other partners. In the present case it is not the case of the Revenue that in the partnership firm, there are other non corporate, who are partners or the firm is not for the purpose of business. It is seen the assessee has been granted the benefit of deduction u/s in earlier years and in 2 assessment years i.e. A.Y. 2006-07 and A.Y. 2010-11, the benefit of Sec. 80IA(4) was denied to the assessee by the AO for a different reason and not for the reason that the assessee was a firm and not a consortium of companies. The claim of deduction was subsequently allowed by the Coordinate Bench of Tribunal vide order dt.05.04.2013 in IT A No. 1214/PUN/2010 for A.Y. 2006-07 and vide order dt. 10.03.2017 in ITA No. 1920/PUN/2014 for A.Y. 2010-11. Thus, the claim of deduction u/s 80IA(4) of the Act has been allowed to the assessee in past from A.Y. 2004-05 onwards. Further, Revenue has not brought or record any new facts in the year under consideration due to which its claim of deduction u/s 80IA(4) could be denied to the assessee.

*5.3.4 Thus, the Hon'ble ITAT has given a clear finding that the appellant falls under the category of 'Consortium' and therefore is eligible for deduction as per the provisions of the Sec 80IA(4) of the Act. Respectfully, following the decision of the Hon'ble ITAT in order No. ITA No. 633/PUN/2017 dated 23-02-2018, it is held that the appellant falls under the category of 'Consortium' and therefore is eligible for deduction as per the provisions of the Sec 80IA(4) of the Act. Accordingly, Ground No. 2 of the appellant is **ALLOWED.**"*

5. The Ld.AR submitted that the Hon'ble ITAT Pune in assessee's own case in ITA No.633/PUN/2017 has observed that consortium is a group of people or a firm . The Ld.AR heavily relied on the order of the ITAT (supra) and ld.CIT(A).

5.1 The Ld.DR supported order of the AO. The Ld.DR submitted that Firm is not mentioned in the section , only company or consortium of company is mentioned. Hence assessee, being a firm not eligible for deduction.

ITA No.1386/PUN/2018 for A.Y.2010-11 (by Revenue):

6. We have heard both the parties and perused the record. It is a fact that assessee is a firm in which three companies are partners. ITAT Pune in assessee's own case in ITA 633/PUN/2017 has held as under :

Quote, “ On the issue of assessee not being eligible for deduction u/s 80IA(4) as it being a partnership firm is concerned, it is an undisputed fact that the assessee is a partnership firm consisting of 3 companies namely Rohan Builders (India) Pvt. Ltd, Rajdeep Buildcon Pvt., Ltd and Rajdeep Road Developers Pvt., Ltd with a profit sharing ratio of 50:40:10 respectively. It is also a fact that in the case of assessee apart from the aforesaid 3 partners, there are no other non-corporate entities, who are partners. It is also a fact that the partnership firm came into existence on 11.04.2001 and the same partners continued in the year under consideration without any change in the constitution. It is a fact that according to provisions of Sec.80IA(4)(i)(a), the section applies to an enterprise which is a company registered in India or a consortium of companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act. It is also a fact that the word “consortium” used in the provision has not been defined in the Income Tax Act. As per the Merriam Webster dictionary, the word “consortium” means “an agreement, combination, or group (as of companies) formed to undertake an enterprise beyond the resources of any one member”. As per the Collins English Dictionary, a “Consortium” is a group of people or firms who have agreed to co-operate with each other”. We find that the Hon’ble Madhya Pradesh High Court in the case of Org Informatics (supra) has observed that a consortium is akin to a partnership where each partner is liable for action of other partners. In the present case it is not the case of the Revenue that in the partnership firm, there are other non corporates, who are partners or the firm is not for the purpose of business. It is seen that the assessee has been granted the benefit of deduction u/s 80IA(4) in earlier years and in 2 assessment years i.e., A.Y. 2006-07 and A.Y. 2010-11, the benefit of Sec.80IA(4) was denied to the assessee by the AO for a different reason and not for the reason that the assessee was a firm and not a consortium of companies. The claim of deduction was subsequently allowed by the Coordinate Bench of Tribunal vide order dt.05.04.2013 in ITA No.1214/PUN/2010 for A.Y. 2006-07 and vide order dt.10.03.2017 in ITA No.1920/PUN/2014 for A.Y. 2010-11. Thus, the claim of deduction u/s 80IA(4) of the Act has been allowed to the assessee in past from A.Y. 2004-05 onwards. Further, Revenue has not brought on record any new facts in the year under consideration due to which the claim of deduction u/s 80IA(4) could be denied to the assessee. ”**Unquote.**

6.1 It is a fact that for earlier years revenue has allowed the claim of deduction on the same facts of the case. Therefore, we do not find any infirmity in the order of the Ld.CIT(A) in allowing the claim of deduction u/s80IA(4) of the Act.

6.2 Therefore, the grounds raised by the Revenue's are dismissed for the A.Y. 2010-11.

C.O.No.16/PUN/2021 for A.Y.2010-11 (by Assessee):

7. By the cross objection , the assessee has challenged reopening. The Ld.AR submitted that the reopening is based on mere change of opinion and it is based on audit objection.

7.1 We have heard both the parties and perused the record. It is observed from the Original Assessment Order passed/s 143(3) on 18/3/2013, para 3 and 4 that assessee is a firm. The names of the partners of the firm are mentioned in para 4. Thus at the time of original assessment order, the AO was aware of the fact that the assessee is a Firm having three partners. In spite of that the AO has not denied the deduction u/s 80IA(4) on the ground that assessee is a firm. During the original assessment , the AO has allowed assessee's claim of deduction u/s 80IA(4) for the project Terna Bridge, and denied deduction u/s 80IA(4) for other two projects holding that those two projects are not new infrastructural facility. It means AO after considering the fact have concluded that the assessee, though firm was eligible for deduction for Terna Bridge Project. In this fact , we are of the opinion that the reopening is based on change of opinion. On perusal of the reason recorded , it is observed that the AO has not brought any new material on record for reopening. In the assessment order passed u/s 147, in para 4, it is clearly mentioned that there was Audit Objection.

7.2 Therefore, we are of the opinion that the reopening is not valid. Therefore, the assessee's Cross Objection Appeal is allowed for Assessment Year 2010-11.

7.3 In the result, Cross Objection Appeal filed by the Assessee is allowed.

ITA No.1837/PUN/2018 A.Y. 2014-15 (by Revenue):

8. The Revenue's Ground No.1 is with reference to assessee's claim of deduction u/s 80IA(4) of the Act. The Assessing Officer had denied deduction u/s 80IA(4) of the Act only on one ground that the Assessee is a Firm.

8.1. We have decided this issue in favour of assessee in ITA1836/PUN/2018. The said decision applies *mutatis-mutandis* to this appeal also. Accordingly, the Revenue's Ground No.1 is Dismissed.

Ground No.2:

9. For this year the AO has amortized the opening WDV over the remaining concession period following the CBDT Circular No.9/2014. Thus the AO denied assessee's claim of depreciation treating the right of toll collection as intangible asset. Aggrieved by the AO's order the assessee filed an appeal before Id.CIT(A). The Id.CIT(A) allowed the claim of the assessee following ITAT order in assessee's own case in ITA No.633/PUN/2017.

9.1 We have heard both the parties and perused the records. The Hon'ble ITAT Pune in assessee's own case in ITA No.633/PUN/2017 held as under,;

Quote, " 15. On the issue of depreciation @ 25% claimed by assessee and allowed by AO, it is an undisputed fact that assessee had entered into different concession agreements with Public Works Department of Maharashtra for construction of certain roads and its operation and maintenance for an agreed period on Build Operate and Transfer (BOT) basis. By virtue of the concession agreement, assessee was granted right to collect and retain toll for the defined concession period. The right to collect toll was considered by assessee to be a form of licence and thus an intangible right as per provisions of Sec.32(1)(ii) of the Act and therefore being eligible for depreciation at 25%. We find that on identical facts namely the issue of depreciation on intangible rights, was before the Coordinate Bench of Pune Tribunal in the case

*of Ashoka Infrastructure Pvt. Ltd (supra). The Co-ordinate Bench of the Tribunal, after considering the decision rendered by Mumbai Tribunal in the case of ACIT Vs. West Gujarat Expressway Ltd., reported in (2015) 57 taxmann.com 384, which in turn had relied upon the ratio laid down by Hon'ble Bombay High Court in the case of North Karnataka Expressway Ltd., Vs CIT reported in (2015) 372 ITR 145 (Bom) and after considering the CBDT Circular No.9/2014 dated 23.04.2014 (which has also been relied upon by Ld PCIT in the present case) has held that the right to collect toll is capital expenditure and consequently the assessee is entitled to claim depreciation on such intangible assets as provided u/s 32(1)(ii) of the Act. Before us no material has been placed by the Revenue to demonstrate that the aforesaid decision of Pune Tribunal in the case of Ashoka Infrastructure (supra) has been set aside / overturned by higher judicial forum.” **Unquote.***

10. Therefore, respectfully following the above decision of the Hon'ble ITAT Pune, we hold that assessee's claim of depreciation shall be allowed. Thus, the Ground No.2 of Revenue is dismissed.

11. To sum up, two appeals filed by the Revenue are dismissed and the Cross Objection appeal filed by the Assessee is allowed.

Order pronounced in the open Court on 13th June, 2022.

Sd/-
(S.S.VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 13th June, 2022/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A) concerned.
4. The Pr. CIT concerned.
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, “बी” बेंच,
पुणे / DR, ITAT, “B” Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे/ITAT, Pune.