IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI

Before Sh. N. K. Choudhary, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1400/Del/2018 : Asstt. Year : 2014-15

Ircon International Ltd., C-4, District Centre, Saket, New Delhi-110017	Vs	Addl. CIT, Special Range-4, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACI0684H		

ITA No. 2062/Del/2018 : Asstt. Year : 2014-15

Addl. CIT, Special Range-4, New Delhi	Vs	Ircon International Ltd., C-4, District Centre, Saket, New Delhi-110017
(APPELLANT)		(RESPONDENT)
PAN No. AAACI0684H		

Assessee by : Sh. Rakesh Gupta, Adv. &
Sh. Deepesh Garg, Adv.
Revenue by : Ms. Sapna Bhatia, CIT DR

Date of Hearing: 30.08.2022		**Date of Pronouncement: 07.09.2022**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The cross appeals have been filed by the assessee and the Revenue against the orders of ld. CIT(A)-35, New Delhi, dated 29.12.2017.

2. In ITA No. 1400/Del/2018, following ground have been raised by the assessee:

> *"1. (a)That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in treating the foreign income of Rs.812,37,75,113/- as taxable in India whereas this income is not taxable in*

India in any manner and more so when assessee is following exemption method and paid taxes on the said income under the tax laws of the Host Country as per the provisions of Double Taxation Avoidance agreement and impugned addition is illegal and is based on incorrect facts and findings and without considering and appreciating the facts and circumstances of the case and the same is not sustainable on various legal and factual grounds.

1(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in treating the global income of Rs.812,37,75,113/- taxable in India is beyond jurisdiction, illegal, bad in law and against the facts and circumstances of the case.

2.(a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making disallowance of Rs.8,49,00,000/- on account of Corporate Social responsibility expenses and that too without observing the principles of natural justice.

2(b) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making disallowance of Rs.8,49,00,000/- on account of Corporate Social responsibility expenses is bad in law and against the facts and circumstances of the case.

3.(a) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in sustaining the action of Ld. AO in making disallowance of Rs. 134.585 lacs u/s 14A r.w.r. 8D.

3(b) That in any case and in any view of the matter, action of Ld. CIT(A) in sustaining the action of Ld. AO in making disallowance of Rs. 134.585 lacs u/s 14A r.w.r. 8D is beyond jurisdiction, illegal, bad in law and against the facts and circumstances of the case.

4. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in

making disallowance of Rs.8,26,887/- on account of advances written off and that too without observing the principles of natural justice."

3. In ITA No. 2062/Del/2018, following ground have been raised by the Revenue:

"1. Whether on the facts and circumstances of the case the Ld. CIT(A) is correct in law in allowing the deduction u/s 80IA amounting to Rs. 125,84,03,631/- by rejecting the view of the AO that the agreement entered into by the assessee is of work contract nature and accordingly it is not eligible for deduction u/s 80IA of the Income Tax Act, 1961.

2. Whether on the facts and circumstances of the case the Ld. CIT(A) is correct in law in deleting the addition of Rs. 105,96,46,297/- made on the account of Provisions for maintenance by holding these expenditure similar to after sale service/ warranty expenditure.

4. Whether on the facts and circumstances of the case the Ld. CIT(A) is correct in law in excluding the Income from Malaysiya and Sri Lanka of Rs. 812,37,75,113/- from net profit for the working out of book profit u/s 115JB of Income Tax Act, 1961."

ITA No.2062/Del/2018 (Departmental Appeal)

4. At the outset, it is found that all the three grounds taken up by the Revenue stands covered by the earlier order of the ITAT in ITA No.2401/Del/2013 for the A.Y. 2006-07.

Disallowance of Deduction u/s 80IA:

5. During the year the assessee claimed deduction u/s 80IA of the Income Tax Act, 1961 for the following projects taken up at page no. 4:

S. No.	Name of the Project	Nature of the project	Authority/ statutory body awarding the project	Total income eligible for deduction u/s 80-IA (In Rs.)
1	ROB Patna	Development of Bridges	Ministry of Railway	2,54,68,823
2	Rashtriya Sam Vikas	Development of Road	Ministry of Surface and Transport	2,54,32,611
3	Ganga Bridge, Patna	Development of Bridges	Central Railway	55,04,90,872
4	ROB Pathankot	Development of Bridges	NHAI	1,25,903
5	RCF, Raibareli Project	Rail Coach Factory	RCF, Rai Bareli Administration	45,37,54,901
6	ROB Jaipur (New)	Road over Bridge	Govt. of Rajasthan	8,17,36,901
7	ROB Patna Phase II(New)	Road over bridge	Govt. of Bihar	11,61,91,269
8	PMGSY Jharkhand	Construction of roads and bridges	Govt. of Jharkhand and India	43,62,828
9	RE Sri Nagar	Rail electrification	Northern Railway	8,39,522
	Total			125,84,03,631

6. After going through the provisions of different agreements as mentioned above, the AO held that they clearly indicate that the assessee company was awarded contract by different agencies for executing certain work and the assessee company is required to execute these works in specified period and to the satisfaction of the work awarding agencies. Further, in most of the cases, the remuneration/ assessee company's fee is a specified percentage of total cost of the work. The payment is to be released by the work awarding agencies on the basis of progress of the project/ cost incurred by IRCON. All these characteristics of contract agreements clearly indicate that these are "work contracts" and the assessee cannot be said as developer of these facilities.

7. The same issue stands adjudicated by the Co-ordinate Bench of ITAT in assessee's own case in ITA No.2401/Del/2013

for the A.Y. 2006-07. The operative part of the order is reproduced as under:

"3.1 At the outset, we find that this issue has been adjudicated in favour of the assessee and the deduction has been held to be allowable vide the orders of the Co-ordinate of the ITAT for the A.Ys. 2000-01, 2001-02, 2003-04, 2005-06. For the sake of ready reference, the relevant portion of the order of the ITAT in the combined order in ITA No. 977/DEL/2010 for A.Y 2004-05 and ITA No. 2220/DEL/2011 for A.Y 2005-06 dated 30.01.2020 is reproduced below:

"36. Ground No. 2 relates to the deletion of disallowance of deduction u/s 80IA of the Act amounting to Rs. 26.71 crores made by the Assessing Officer.

37. The claim of deduction came up for adjudication for the first time in Assessment Year 2000-01 and the co-ordinate bench in ITA No. 2596/DEL/2004 held as under:

"3.5 Considering the arguments advanced by the parties and after going through the orders and material placed before us, we hold as under" Regarding the claim of deduction u/s 801A, it is seen that appellant is a company and has entered into contracts with various Central Government, State Government, State Government and Local Authority and other statutory bodies. A close reading of the agreement (for instance agreement with MSRDC enclosed in the paper book) clearly shows that appellant developed the infrastructure facility and has not acted merely as contractor as sought to be made out by Assessing Officer and C1T (Appeals). The Oxford dictionary defines the term developer as a person that designs and crate new products, whereas contractor is a

person or a company that has a contract to do work or to provide goods or services. Various clauses of the above referred agreement to which reference has been made by us little below would show that the construction rail over bridge projection (ROB) 23 awarded by MSRDC to the appellant is nothing but development of infrastructure facility, which was to be legally handed over to the Railways and MSRDC after the payment was received. Various clauses of the agreement would show that the jobs done by the appellant were planning, execution, construction and making the infrastructure facility ready for operations. Ld. Assessing Officer has not pointed out any specific clauses of any agreement, which shows that all attributes of development were not present. Making a bald assertion that assessee was a contractor does not serve any purpose. Merely using the terms contractor in the agreement would not make any difference as what has to be seen is the substance. Anybody who enters into a contract is closely called a contractor but that does not mean that such person entering into the contract cannot be developer. The other agreement with MSRDC shown to us as one as instance clearly shows mat appellant was engaged in investigation, planning, organizing and construction of road over bridge within the stipulated time. If the activities undertaken by the appellant cannot be termed as development, we are afraid then what can be called development? Therefore, we do not have any hesitation in holding in view of the arguments advanced from the sides of both parties and decisions relied upon that appellant was developing infrastructure facility and claimed deduction u/s 80IA in respect of income derived from the development of infrastructure facilities. Explanation inserted below section 80IA(13) does not prevent developers in claiming deduction

u/s 80IA(4). Similarly showing the receipts as work receipts in the books of accounts of the appellant alone cannot determine the character of the appellant which in our opinion was that of development. The argument of revenue that infrastructure facility should be owned by the appellant is also misplaced in view of ITO vs. Cable 24 Constructions 354 ITR 13 (Guj.) and various decisions relied upon by the Ld. Counsel for the appellant. We also note that the Ld. CIT (DR) tried to raise issues which were not even the case of the assessing officer and this in our considered opinion is clearly impressible. Case laws relied by the revenue are clearly misplaced on facts and are clearly distinguishable. Special bench decision in the case of B. T. Patil (Mum.) 126 TTJ 577 was recalled later on as it did not consider the binding decision of Hon'ble Bombay High Court in the case of ABG 322 ITR 323 (Bom). According to the assessment order, copies of all the agreements were before Assessing Officer yet assessing officer chose to make sweeping observation that the assessee is not developer. Such sweeping and bald assertion cannot be approved by us. Therefore, taking into the facts of the present case, we are the considered view that appellant is entitled to claim deduction 80IA, which was wrongly denied. We set aside the order of the ld. CIT (Appeals) and direct the Assessing Officer to allow deduction u/s 801A has claimed by the appellant. Ground No. 1 is allowed."

8. As no new facts have been brought on record for the year under consideration, respectfully following the findings of the co-ordinate bench, we direct the Assessing Officer to allow deduction u/s 80IA of the Act.

Provision for maintenance:

9. The assessee has challenged disallowance of provision for maintenance for the project executed by the assessee amounting to Rs.105,96,46,297/- The Assessing Officer has held that this provision has been made on estimated basis and unascertained liability. The assessee submitted that it has to maintain or repair the defects in the projects executed by it during the defect liability period as specified in the contract agreement. The assessee claimed that these are mandatory expenses and provision has been made on the basis of its past experience and on scientific basis, therefore, such provision is an allowable expenditure.

10. It was submitted that the provision for maintenance expenditure is provided to cover the company's expenditure to liability towards defect rectification and/or maintenance incurred by the company after completion of the contract. Such provision is made taking into account contractual provisions, operating turnover for the year, type of project, period of maintenance, contractual obligations of the subcontractors and other relevant factors, if any. As per the agreement with the client, the company is liable to maintain the works executed by it even after the projects are completed and handed over to the clients, for a period of 12 or 24 months from the date of completion. During this period, all the defects are to be rectified free of cost even though the Company has already handed over completed project to the client. The total project cost i.e. contract receipts, have already been received from the client in respect of the said projects before handing over the same to the client and no separate consideration is receivable.

During the year an amount of Rs.2,27,42,328/- has been provided for non-DTAA project and Rs.7,18,000/- for DTAA projects.

11. The ld. CIT(A) deleted the addition holding that the assessee has been claiming that provision for maintenance has been made taking into account contractual provision, operating turnover of the year, type of project period of maintenance and other relevant factors. It was held by the ld. CIT(A) that as per contract agreement the assessee is liable to provide free of cost maintenance to the clients for the period mentioned in the agreement. At the time of completion of the contract, liability arises in the hands of the assessee company to provide free maintenance to the various contractees for the period specified in the agreement. This liability arises at the time of the completion of the project itself and obviously the expenditure required can only be estimated on the basis of past experience, nature of the contract, type of the project and turnover of the assessee in that particular year. The ld. CIT(A) held that the assessee claimed that estimate has been made on best estimated basis based upon the experience in the construction industry and therefore, the objection of the Assessing Officer that the liability has not arisen during the year as it has been quantified on estimated basis is not correct.

12. It is also a fact not disputed by the Assessing Officer in the assessment order that all along the provision for maintenance of expenses have been allowed to the assessee company except the disallowances made in A.Y. 1985-86 and 1995-96.

13. We find that the same matter of provision for maintenance stands adjudicated by the Co-ordinate Bench of the Tribunal.

The assessee has been providing for expenses to be incurred on demobilization, maintenance and other expenses since by inception of the Company. The same has been allowed by the Department all along except in the Assessment Years 1985-86, 1995-96 & 2001-02, 2002-03, 2003-04, 2004-05 and 2005-06. In these years, the A.O. disallowed the aforesaid provisions. Further, in appeal before the Ld. CIT(A), in the assessment year 1985-86, 1995-96 and 2001-02 and 2002-03, these were allowed on the basis of the aforesaid judicial analysis.

14. Since, the decision of the ld. CIT(A) is based on the decision of the earlier years which stands upheld, we decline to interfere with the order of the ld. CIT(A) on this issue.

Income from foreign Contracts (Malaysia and Sri Lanka) – u/s 115JB:

Ground No. 1 in ITA No. 1400/Del/2018 (Assessee Appeal)
Ground No. 4 in ITA No. 2062/Del/2018 (Revenue Appeal)

15. The issue has been extensively discussed at para no. 10 to 14 in the order of the ITAT ITA No.2401/Del/2013 A.Y. 2006-07 vide order dated 23.01.2022.

16. This issue has been adjudicated by the Tribunal in ITA No.2596/Del/2004 for the A.Y. 2000-01 and also in ITA No.1825/Del/2005 dated 31.10.2019 and allowed in favour of the assessee. The relevant part of the order of the Tribunal is as under:

"22.2 The Assessing Officer held that adjustment can be made only as provided in Explanation to section 115J as decided by the Hon'ble Supreme Court in the case of Apollo tyres Vs CIT (2002) 255 ITR 273 (SC). According to him, exclusion of DTAA is not provided in

that explanation. The Ld. CIT(A) confirmed the action of the Assessing Officer.

22.3 Before us the Ld. Counsel of the assessee submitted that issue in dispute is covered in the favour of the assessee by the decision of the Tribunal in the case of the assessee for assessment year 2000-01, wherein it is held that when such income is not to be taxed as per DTAA, it cannot be brought to tax indirectly under the deeming fiction under section 115JB of the Act.

22.4 The Ld. DR, on the other hand relied on the order of the lower authorities.

22.5 We have heard rival submission and perused the relevant material on record. The Tribunal in ITA No. 2596/Del/2004 in the case of the assessee for assessment year 2000-01 has adjudicated on the identical issue in dispute involved as under:

"9. We considered the above heard the rival submissions made by the parties in respect of Ground No.7 and it is seen that income earned from permanent establishment in foreign countries is liable to be excluded from the computation of book profit in view of the decision in the case of the bank of Tokyo-Mitsubishi UFJ Ltd vs. ADIT 152 1TD 796 (Del.), which has been affirmed by Hon'ble High Court of Delhi. When such income is not to be taxed as per DTAA, it cannot be brought to tax indirectly under the deeming fiction under section115JA. Accordingly, this ground of appeal is decided in favor of the appellant."

22.6 The issue in dispute involved in the present ground of the appeal, being identical to the issue adjudicated by the Tribunal (supra) above, respectfully following the finding of the Tribunal (supra), we direct the Assessing Officer to exclude the income which is subject matter of dispute under this ground of the appeal from the ambit of the computation of book profit under section 115JB of the Act. The ground of the appeal is according allowed."

17. Following the orders of the Co-ordinate Benches of the Tribunal, the appeal of the Revenue on this ground is dismissed and that of the assessee is allowed.

ITA No. 1400/Del/2018 (Assessee's appeal):

Advances Written off:

18. This ground relates to disallowance made by the AO amounting to Rs.8,26,887/- on account of advance written off. On the ground that, no details regarding advances written off has been filed by the assessee before the AO.

19. The ld. CIT(A) held that the expenditure was already allowed in the year in which the material was purchased and the same cannot be allowed twice when the same has been returned by the sub-contractor.

20. On going through the facts, we decline to interfere with the ratio of the ld. CIT(A). The appeal of the assessee on this ground is dismissed.

CSR Expenses:

21. The assessee has incurred an amount of Rs.8.49 Cr. on account of Corporate Social Responsibility which the Assessing Officer treated as non-allowable business expenditure. The ld. CIT(A) held that the deduction u/s 37 of the Income Tax Act, 1961, the primary condition is that the expenditure should be incurred wholly and exclusively for the purpose of business and profession. It is clear that these expenses do not have direct nexus with the assessee's business and therefore it cannot be said that the same has been incurred for the purpose of the assessee's business. The ld. CIT(A) held that the objective of

CSR expenditure is to share the burden of Government in providing social services and therefore if such expenses are allowed as deduction from income, it would amount to subsidizing part of expenditure by the Government.

22. The issue of deduction of CSR expenses read with Explanation 2 to Section 37(1) w.e.f. 1st April 2015 has been examined by the Co-ordinate bench of this Tribunal in the case of ACIT vs. Jindal Power Ltd. (2016) 70 taxmann.com 389 (Raipur Tribunal) wherein it was held as under:-

"*18. We have also take note of the fact that in view of insertion of Explanation 2 to Section 37(1), with effect from 1st April 2015, which provides that "for the removal of doubts, it is hereby declared that for . the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession", the expenses incurred in discharging corporate social responsibility are not deductible in computation of business income. Learned Departmental Representative submits that this amendment should be treated as clarificatory in nature, as it is stated to be in so many words, and we should, therefore, hold that the expenses in discharging corporate social responsibility were outside the ambit of expenses deductible under section 37(1).*

19. We are unable to see legally sustainable merits in this plea either. The amendment in the scheme of Section 37(1), which has been introduced with effect from 1st April 2015, cannot be construed as to disadvantage to the assessee in the period prior to this amendment. This disabling provision, as set out in Explanation 2 to Section 37(1), refers only to such corporate social responsibility expenses as under Section 135 of the Companies Act, 2013, and, as such, it cannot have any application for the period not

covered by this statutory provision which itself came into existence in 2013. Explanation 2 to Section 37(1) is, therefore, inherently incapable of retrospective application any further. In any event, as held by Hon'ble Supreme Court's five judge constitutional bench's landmark judgment, in the case of CIT v. Vatika Townships Pvt. Ltd (2014) 367 ITR 466/227 Taxman 121/49 taxmann.com 249 (SC), the legal position in this regard has been very succinctly summed up by observing that "Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre [, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing 'taw." It may appear to be some kind of a dichotomy in the tax legislation but the well settled legal position is that when a legislation confers a benefit on the taxpayer by relaxing the rigour of pre-amendment law, and when such a benefit appears to have been the objective pursued by the legislature, it would be a purposive interpretation giving it a retrospective effect but when a tax legislation imposes a liability or a burden, the effect of such a legislative provision can only be prospective. We have also noted that the amendment in the scheme of Section 37(1) is not specifically stated to be retrospective and the said Explanation is inserted only with effect from 1st April 2015. In this view of the

matter also, there is no reason to hold this provision to be retrospective in application. As a matter of fact, the amendment in law, which was accompanied by the statutory requirement with regard to discharging the corporate social responsibility, is a disabling provision which puts an additional tax burden on the assessee in the sense that the expenses that the assessee is required to incur under a statutory obligation in the course of his business are not allowed deduction in the computation of income. This disallowance is restricted to the expenses incurred by the assessee under a statutory obligation under section 135 of Companies Act 2013, and there is thus now a line of demarcation between the expenses incurred by the assessee on discharging corporate social responsibility under such a statutory obligation and under a voluntary assumption of responsibility. As for the former, the disallowance under Explanation 2 to Section 37(1) comes into play, but, as for latter, there is no such disabling provision as long as the expenses, even in discharge of corporate social responsibility on voluntary basis, can be said to be "wholly and exclusively for the purposes of business". There is no dispute that the expenses in question are not incurred under the aforesaid statutory obligation. For this reason also, as also for the basic reason that the Explanation 2 to Section 37(1) comes into play with effect from 1st April 2015, we hold that the disabling provision of Explanation 2 to Section 37(1) does not apply on the facts of this case."

23. In the absence of any contrary judgments of either Hon'ble jurisdictional High Court or any other Hon'ble High Courts, we hereby direct the AO to delete the disallowance.

Disallowance u/s 14A r.w. Rule 8D(iii):

24. The details of the investment of the assessee are as under:

Particulars	*Balance as on 31-03-2014 (Rs. in crores)*	*Balance as on 31-03-2013 (Rs. in Crores)*
*Non Current (refer schedule 12 of Balance sheet **PB534**)*	*191.19*	*116.27*
*Current Investments (refer schedule 16 of balance sheet **PB538**)*	*176.01*	*64.95*
Total	*367.20*	*181.22*

Average investment= (367.2+181.22)/2=274.21 Cr.

25. The AO noticed that assessee declared tax free income amounting to Rs.17,82,35,102 /- and itself disallowed a sum of Rs.2.52 lakhs u/s 14A of the Act. During the course of assessment proceedings, the assessee informed the AO that no interest was paid on investments made on which assessee earned the exempt income.

26. The assessee contended that it has itself disallowed about 10% of the expenses on salary etc paid to the team consisting of manager (finance) and Asst. Manager considering the time involved by these persons in this activity apart from their routine work. According to AO substantial fresh investment was made in the year ending as on 31.03.2014 and there was increase in investment during the year by an amount of Rs. 198.93 crores. Thus according to AO the amount claimed to have disallowed by the assessee was not commensurate to the exempt income. In his view there were also incidental expenditure of collection, telephone follow up etc.

27. Accordingly invoking the provisions of clause (iii) of Rule 8D(2), the AO made a disallowance of Rs.1,94,86,000/- after

considering the disallowance made by the assessee itself amounting to Rs.2.52 lakhs.

28. During the course of appellate proceedings, it was argued before ld. CIT(A) that the case of assessee is covered with the decision of the Jurisdictional Delhi High Court in the case of M/s ACB India Vs. ACIT, where Hon'ble High Court held that the disallowance u/s 14A cannot be more than 0.5% on the average of the investments made on which the assessee received the dividend income. ld. CIT(A) held that in the present case, the assessee has submitted the details of the dividend received and also worked out the disallowance following the decision of the Hon'ble Delhi High Court, which works out to Rs. 137.105 Lacs. The ld. CIT(A) following the judgment of the Hon'ble Delhi High Court restricted the amount to Rs. 137.105 lacs and determined at Rs. 134.585 lacs owing to the disallowance of Rs.2.52 lakhs made by the assessee.

29. Placing reliance on the judgment of the Hon'ble jurisdictional High Court, keeping in view, the average investments, the disallowance of Rs. 134.585 lacs (Rs. 137.105 – Rs.2.5 lacs) made by the Revenue u/r 8D(2)(iii) by considering 0.5% of the average investment of Rs.271.21 Cr. is hereby sustained.

30. In the result, the appeal of the Revenue is dismissed and the appeal of the assessee is partly allowed.

Order Pronounced in the Open Court on 07/09/2022.

Sd/- Sd/-

(N. K. Choudhary) **(Dr. B. R. R. Kumar)**
Judicial Member **Accountant Member**

Dated: 07/09/2022
Subodh Kumar, Sr. PS