IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "C" : DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA.No.206/Del./2017
Assessment Year 2011-2012

M/s. IRCON International Ltd., C-4, District Centre, Saket, New Delhi - 110017. PAN AAACI0684H	vs.	The DCIT, Circle – 12 (2), New Delhi.
(Appellant)		(Respondent)

ITA.No.1161/Del./2017
Assessment Year 2011-2012

The DCIT, Circle – 12 (2), New Delhi.	vs.	M/s. IRCON International Ltd., C-4, District Centre, Saket, New Delhi - 110017. PAN AAACI0684H
(Appellant)		(Respondent)

For Assessee :	Dr. Rakesh Gupta, Adv. Shri Somil Aggarwal, Adv. Shri Deepesh Garg, Adv.
For Revenue :	Shri R.K. Gupta, CIT(DR)

Date of Hearing :	11.08.2022
Date of Pronouncement :	21.09.2022

ORDER

PER ANIL CHATURVEDI, A.M. :

The above cross appeals by Assessee and Revenue are directed against the order of the Ld. CIT(A)-18, New Delhi, dated 28.12.2016 in Appeal No.89/15-16 relating to the A.Y. 2011-2012 and arises out of the penalty order dated 26.03.2015 passed by the A.O. under section 271(1)(c) of the I.T. Act, 1961 .

1.1. Since common issues are involved in both the appeals, the appeals were heard together and are being disposed of by this common consolidated order for the sake of brevity. The Learned Counsel for the Assessee submitted that the decision taken in ITA.No.206/Del./2017 for the A.Y. 2011-12 may be applicable to the Revenue Appeal in ITA.No.1161/Del./2017 for the A.Y. 2011-12 also, to which, the Ld. D.R. has objection.

2. We, therefore, cull-out the relevant facts from ITA.No.206/Del./2017 for the A.Y. 2011-12 as under :

2.1. Briefly stated facts of the case are that the assessee company is a Government of India undertaking and is engaged in the execution of Civil Engineering, Electrical and Communication and Turnkey contract, In India as well as Abroad. The assessee filed its return of income for the A.Y. 2011-12 electronically declaring total income at Rs.56,51,36,481/-. The case of the assessee was selected for scrutiny and assessment was framed under section 143(3) of the I.T. Act, 1961 vide order dated 18.10.2013 and the total income of the assessee was determined at Rs.5,86,65,31,285/-, inter alia, by disallowing Rs.1,36,47,143/- under section 14A, Exclusion of Income under DTAA Agreement at Rs.4,38,64,96,302/- and denying claim of deduction under section 80IA(4) amounting to Rs.70,79,44,520/-. On the aforesaid disallowances/additions made, the A.O. vide penalty order passed under section 271(1)(c) of the I.T. Act, 1961 dated 26.03.2015 levied the penalty of Rs.153,24,26,390/-.

2.2. Aggrieved by the penalty order of the A.O, assessee carried the matter in appeal before the Ld. CIT(A) who vide order dated 28.12.2016 granted partial relief to the assessee.

3. Aggrieved by the order of the Ld. CIT(A), the assessee is now in appeal before us and has raised the following grounds :

1. *"That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not deleting the penalty u/s 271(l)(c) imposed by Ld. AO amounting to Rs.1,53,24,26,390/-.*
2. *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 imposing penalty, more so when jurisdiction u/s 271(1)(c) was not assumed in accordance with law.*
3. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming/sustaining the action of Ld.AO in imposing penalty u/s 271(1)(c) even though satisfaction u/s*

271(l)(c) was not recorded in respect of addition of Rs.4,38,64,96,302/- being the amount of income from foreign PE.

4. *That in any case and in any view of the matter, action of Ld. CIT(A) in passing the impugned order and sustaining the penalty u/s 271(1)(c), is bad in law and against the facts and circumstances of the case.*
5. *That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other."*

4. Aggrieved by the order of the Ld. CIT(A), the Revenue is also now in appeal before us and has raised the following grounds :

1. *"On the facts and circumstances of the case, the order dated 28.12.2016 passed by the Ld. CIT(A) u/s 250 of the I.T. Act, 1961 is erroneous and bad in law.*
2. *On the facts and circumstances of the case, the Ld. CIT(A) erred in directing to recomputed the quantum of penalty u/s 271(1)(c) of the Act by reducing the foreign*

tax credit allowed to the assessee from the tax chargeable on income earned in foreign countries.

3. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing."*

5. We, first proceed to decide the grounds raised by the assessee in its appeal.

5.1. Before us, at the outset, the Learned Authorised Representative for the Assessee submitted that A.O. has made the following additions i.e., disallowance under section 14A at Rs.1,36,47,143/-, Exclusion of Income under DTAA Agreement at Rs.4,38,64,96,302/- and denying claim of deduction under section 80IA(4) amounting to Rs.70,79,44,520/-. He submitted that on the aforesaid additions, the A.O. levied the penalty under section 271(1)(c) of the I.T. Act, 1961 at Rs.153,24,26,390/-.

5.2. As far as the penalty on the disallowance of Section 14A is concerned, the Learned Authorised

Representative for the Assessee submitted that the Ld. CIT(A) vide Para No.5.3.3.7 at page-17 of his order has deleted the penalty. He submitted that on the aforesaid deletion of penalty, the Revenue is not in appeal.

5.3. With respect to second addition being Exclusion of income under DTAA Agreement, Learned Authorised Representative for the Assessee submitted that the Ld. CIT(A) vide Para 11.1 at pages42-43 of his order though has not deleted the penalty, but, has directed the quantum of penalty to be revised depending on the tax credit to be given with respect to exclusion of income under DTAA Agreement. He further submitted that when the matter on the aforesaid issue was carried before the ITAT in assessee's own case vide ITA.No.2401/Del./2013 etc., batch for the A.Ys. 2006-07 to 2013-14 and cross-appeals of the Revenue vide ITA.Nos.2442/Del./2013 etc., batch for the A.Ys. 2006-07 to 2013-14, the Tribunal vide consolidated order dated 28.01.2022 and by following the reasoning given while deciding the issue for the A.Y. 2006-07 at para no.41 of the order has decided the issue in favour of the assessee. He,

therefore, submitted that since quantum addition itself has been deleted, the penalty does not survive.

5.4. With respect to third addition namely denying of claim of deduction under section 80IA(4) and the penalty on the same is concerned, the Learned Authorised Representative for the Assessee submitted that the Ld. CIT(A) had upheld the levy of penalty, but, the issue about the claim of deduction under section 80IA has been decided by the Tribunal in assessee's favour at para no.41 in ITA.No.2401/Del./ 2013 etc., consolidated order dated 28.01.2022 (supra). He, therefore, submitted that since quantum addition itself has been deleted, the penalty does not survive.

6. The Ld. D.R. on the other hand, did not controvert the factual position, but, however, furnished the written submissions which are as under :

IN THE MATTER OF APPEAL BY M/S IRCON INTERNATIONAL LTD. FOR A.Y. 2011-12 IN ITA NOS. 206/DEL/2017 ASSAILING THE ORDER OF LD. CIT (A), NEW DELHI, IN APPEAL NO. 272/13-14/CIT (A)-XV DATED 28-2-2014

SUSTAINING THE LEVY OF PENALTY U/S 271(1) (c) ON INCORRECT CLAIM OF DEDUCTION U/S 80IA

The desired brief synopsis is being submitted for your Honours' kind consideration on the limited issue of sustaining of penalty u/s 271(l)(c) of the Income-tax Act, 1961 (The Act, for short) by Ld. CIT (Appeal), in the aforesaid appeal levied by the A.O. rejecting the claim of the Appellant-Assessee u/s 80IA of the Act.

2. Most respectfully the following humble submissions based on facts as well as applicable statutory provisions are made here-in-under for your kind consideration in the interest of justice.

2.1. It is the claim of the Appellant that the issue under consideration is squarely covered by Hon'ble ITAT' decision in Appellant's own case by its earlier consolidated order in ITA No. 2401/DEL/2013 for A.Y. 2006-07 and ITA No. 2563/DEL/2014 for A.Y. 2011-12 on identical issue.

2.2. In this connection, it is most humbly submitted that the Hon'ble ITAT was not benefitted by taking into account the Explanation to sub-section to (13) of Section 80IA of the Act having been inserted by the Finance Act, 2009, with retrospective effect from 01-04-2000 categorically restricting thereby its applicability to works/contracts awarded by any person (including Central and State Governments).

2.3. In order to prove the aforesaid humble submission (Para 2.2), the relevant extracts from the cited consolidated orders of the Hon'ble ITAT dated 28-01-2022 are extracted below verbatim for your Honours' kind consideration-

2.3.1. A.Y. 2006-07

"ITA No.2401/Del/2013 A.Y. 2006-07 : (Assessee's Appeal)

Disallowance of Deduction u/s 801A:

2. The assessee earned profit from development of infrastructure project at Srinagar- Barahmulla Rail Project in J&K and PMGSY Patna project wherein roads have been developed in Bihar. The assessee earned total profit of Rs. 36,14,02,300/- and claimed the same as deduction u/s 80IA of the Income Tax Act, 1961.

3. Aggrieved with the confirmation of disallowance of deduction by the Id. CIT(A) who held that the assessee is not engaged in the business of infrastructure facilities and the assessee in fact a contractor, the appeal has been filed before the Tribunal.

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 after going through the Orders and materials placed before us, we hold as under" Regarding the claim of deduction u/s 801 A, 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 CIT (Appeals). The Oxford dictionary defines the term developer as a person that designs and create 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 as 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 801A 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 v/s. 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 ofABG 322 ITR 323 (Born). 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 80IA has claimed by the appellant, Ground No. is allowed."

4. 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 801 A of the Act."

2.3.2. A.Y. 2011-12

"ITA No. 2563/Del/2014 : A.Y. 2011-12 (Assessee):

Disallowance of deduction u/s 801 A:

Income through PE & u/s 115JB:

41. These issues are akin to the grounds adjudicated above in ITA No. 2401/Del/2013 for the A.Y. 2006-07, hence the same ratio applies. The appeal of the assessee on this ground is allowed."

2.4. It can, thus, be seen that the Hon'ble ITAT was not benefitted by the statutory provisions inserted in the scheme of the original beneficial provisions being Section 80IAof the Act which were categorically made inapplicable to a contractor through the newly inserted Explanation to its original scheme through the Finance Act, 2009.

2.5. It is most humbly submitted that in pursuance of Article 47 of the Constitution of India, the Union Government while discharging its sovereign functions awarded different ***Work***

Contracts *to Appellant assessee during the Financial Year 2010-11, corresponding to A.Y. 2011-12 under consideration of Your Lordships. It is further submitted that the ownership over the projects awarded to the Appellant was retained by the Government itself.*

2.6. It is most humbly submitted that Article 47 is a vital part of ***Directive Principles of State Policy*** *obliging the State inter alia to raise the standard of living. Therefore, in pursuance of these Directives, various Government organs including the Indian Railways have awarded multiple contracts to its wholly owned subsidiaries being the Appellant Assessee for carrying out various development activities including the projects in respect of which the Appellant incorrectly claims to be a* ***developer*** *within the meaning of Section 80IA of the Act.*

2.7. My humble submissions are fortified by Page 118 of Indian Railways Annual Reports and Accounts for the corresponding F.Y. being 2010-11 wherein it has shown its land, building and tracks, rolling stock, plant and equipment as its own fixed assets, having been owned by it.

2.8. Other investments being work-in-progress have separately been shown by the Indian Railways under the heading ***Investments*** *on page* ***118.***

2.9. A copy of the entire cited Annual Report of Indian Railways for the corresponding F.Y. is attached herewith from pages 1 to 132 of the Compendium for your Honours' kind consideration.

2.10. The Appellant Assessee, being the wholly owned Government Company is duty bound to follow the applicable statutory provisions as contained in the Companies Act, 2013,

duly incorporated in its Article 88 (page 170 of the Compendium) while preparing its accounts.

2.11. It is also most humbly brought on record that the Appellant Assessee has accordingly shown its operating income in its profit and loss account as on 31-03-2011 (page 224 of the Compendium) as per Schedule N. Schedule N is available at page 236 of the Compendium wherein its operating income is specified to have included ***Contract Revenue*** *of Rs. 3,140.13 Crores.*

2.12. Further, at page 66 of its corresponding annual report (page 241 of the Compendium), the Appellant Assessee itself further admits ***to have recognized the illustrated contract revenue to the extent it is probable that the economic benefits will flow to it and the revenue can be measured reliably."***

PRAYER

In view of these facts, on-record, duly supported by the applicable statutory provisions, it is most humbly requested that the appeal of the Assessee respecting incorrect claim of deduction u/s 80IA of the Act may be dismissed in the interest of justice.

7. We have heard the Learned Representative of both the parties and perused the material available on record. The issue in the present appeal is with respect to levy of penalty by the A.O. under section 271(1)(c) of the I.T. Act, 1961 under three heads i.e., disallowance under section 14A, Exclusion of Income under DTAA Agreement and denying claim of deduction under section 80IA(4).

7.1. As far as the first issue of disallowance under section 14A is concerned, the Ld. CIT(A) deleted the penalty and the Revenue did not appeal before us. Therefore, we uphold the order of Ld. CIT(A) on this issue in absence of any appeal and in absence of any objection from the side of the Ld. D.R. and delete the penalty levied by the A.O. on this issue.

7.2. As far as the second and third issues i.e., Exclusion of Income under DTAA Agreement and denying claim of deduction under section 80IA(4) are concerned, We find that in assessee's own case for the A.Y. 2011-12 in quantum appeal the ITAT, Delhi C-Bench, Delhi vide order dated 28.01.2022 (supra) has decided the issues in favour of the assessee. Since the issues in quantum appeal are decided in favour of the assessee, the penalty does not survive on these issues. We, therefore, direct the A.O. to delete the penalty on these issues i.e., i.e., Exclusion of Income under DTAA Agreement and denying claim of deduction under section 80IA(4) of the I.T. Act, 1961.

7.3. Since we have already deleted the penalty, the remaining grounds would become academic in nature and, therefore, we are not deciding the same.

7.4. **In the result, appeal of the Assessee is allowed.**

8. The effective ground raised by the Revenue in it's appeal is inter-connected to that of assessee's grounds of appeal no.3 which has been decided by us hereinabove in the preceding paragraphs in favour of the assessee by cancelling the penalty levied by the A.O. Since we have cancelled the penalty levied by the A.O, the appeal of the Revenue would become infructuous. **Accordingly, the ground of appeal of Revenue is dismissed.**

9. **In the result, appeal of the Revenue is dismissed.**

10. **To sum-up, appeal of the Assessee is allowed and appeal of the Revenue is dismissed.**

Order pronounced in the open Court on 21.09.2022.

Sd/-	Sd/-
(MS. ASTHA CHANDRA)	(ANIL CHATURVEDI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Delhi, Dated 21st September, 2022

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'C' Bench, Delhi
6.	Guard File.

// By Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.