

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
(Conducted through E-Court, Rajkot)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER,
And
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 383/Rjt/2017
निर्धारण वर्ष/Asstt. Years: 2013-2014

Patel Highway Management Pvt. Ltd., 2 nd Floor, Patcon House, Kalwad Road, Kotecha Chowk, Rajkot. PAN: AAFCP1839G	Vs.	I.T.O., Ward-2(1)4, Rajkot.
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Assessee by :	Shri Hardik Vora, A.R
Revenue by :	Shri Shramdeep Sinha, CIT. D.R

सुनवाई की तारीख/**Date of Hearing** : **19/09/2022**
घोषणा की तारीख/**Date of Pronouncement**: **11/11/2022**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals)-2, Rajkot, dated 22/08/2017 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2013-14.

2. The only issue raised by the Revenue is that the learned CIT(A) erred in deleting the disallowance of deduction claimed by the assessee under section 80-IA of the Act.

3. The facts in brief are that the assessee is a private limited company incorporated as special purpose vehicle by the consortium of M/s Patel Infrastructure Pvt. Ltd (in short PIPL) and M/s Katira Construction Ltd (in short KCL) and engaged in the business of Contractor and Construction activities. During the year under consideration, the assessee from the activity of operating and maintaining of toll plaza for the road at Palanpur – Radhanpur - Samkhyali Highway has shown turnover of Rs. 131,64,40,915/-, GP of Rs. 40,12,24,843/- and NP of Rs. 12,83,47,312/- only. The assessee in the return of income declared income at Rs. NIL after claiming deduction under section 80-IA of the Act.

4. The AO found that the consortium of PIPL and KCL entered into concession contract with NHAI on 23-10-2009 to Operate, Maintain and Transfer of 118 KM of Palanpur- Radhanpur section of NH-14 and 142.5KM of Radhanpur- Samkhiyali section of NH-15 for a period of 9 years terminating as on 26-04-2019. As per the contract, the consortium of PIPL and KCL was to execute major operation and maintenance of the above said road and was having exclusive right to collect and retain the Toll charges till the date of termination of the contract. The consortium of PIPL and KCL to carry out the above work awarded by the NHAI created Assessee Company as special purposes vehicle. Thus the AO was of the view that the contract was awarded to PIPL and KCL on the basis of evaluation of their financial and technical capabilities and not to the assessee company. As such the assessee company was not even incorporated as on the date of letter of award of the contract. Hence, the assessee company does not meet the condition prescribed under clause (i) to subsection (3) to section 80-IA of the Act.

4.1 The AO also found that the assessee company has not constructed any new infrastructure facility as explained by the CBDT in the circular number 4 of 2010 dated 18-05-2010. The said road already was in existence, developed and constructed by third party in the year 2008-09. As such the assessee was to operate and maintain only of an existing highway which means assessee has not carried any activity of construction of new infrastructure facility as envisaged under the provision of section 80-IA of the Act. Therefore, the AO in view of the above disallowed the claim of the assessee under section 80-IA of the Act and assessed income at Rs. 15,75,03,005/- only.

5. On appeal by the assessee, the learned CIT(A) after following the order of this tribunal in the own case of the assessee for the AY 2011-12 has deleted the disallowances made by the AO.

6. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.

7. The learned DR before us contended that the assessee has not developed any infrastructure facility and therefore the assessee is ineligible to claim the deduction under the provisions of section 80 IA (4) of the Act.

8. On the other hand, the learned AR before us contended that the ITAT in the own case of the assessee involving identical facts and circumstances has allowed the deduction under the provisions of section 80 IA(4) of the Act.

9. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

10. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that identical issue came up before this tribunal in the own case of the assessee for AY 2011-12 in ITA No.

135/RJT/2016 where the issue has been decided in favour of the assessee and against the Revenue. The relevant finding of the bench extracted as under:

10. *We have heard the rival contention and perused the record placed before us. Sole issue raised by Revenue is against the order of "Ld.CIT (A)" deleting disallowance made by the "Ld.AO" denying deduction u/s.80IA(4) of the Act at Rs.7,73,77,928/-*

11. *We observe that NHAI awarded the contract to operate maintain and transfer (OMT) for 118 kms of Palanpur to Radhanpur section of NH-4 and 142.5 kms for Radhanpur to Samkhiyali section on NH-15 to consortium of two companies namely PIPL and KCL vide "Letter of Award" (LOA) dated 08/9/2009. Thereafter on 25/09/2009 both the companies namely PIPL and KCL vide their letter dated 25/09/2009 applied "NHAI" to authorize M/s.Patel Highway Management Pvt. Ltd. to execute the "concession agreement" of (OMT) given to their consortium by LOA dated 08/9/2009. We further notice that assessee company i.e PHPL is a "special purposes vehicle" (SPV) which was specifically incorporated by the consortium of two companies i.e PLPL and KCL to undertake the "operation, maintenance and transfer" project given by "NHAI". Subsequent to the application given by these two companies on 25/09/2009, "NHAI" authorities gave acceptance and entered into a "concession agreement" with M/s.Patel Highway Management Pvt. Ltd. i.e the assessee on 23/10/2009, which form part of the paper book from page 18 to 76. Thereafter assessee's company carried on project to "operate, maintain and transfer" and claimed deduction of profits from these project u/s.80IA(4) of the Act.*

12. *We observe that "Ld.CIT (A)" deleted the impugned disallowance u/s.80IA(4) of the Act by observing as follows:*

The finding of the AO, while denying the claim of deduction, was focused -

- *That the letter of award has been allotted to the consortium of M/s. Patel Infrastructure Pvt. Ltd. and M/s. Katira Construction Ltd on the basis of the evaluation of the financial and technical capacity of both the companies and not to the appellant;*

- *that time the appellant company was not even in existence when the letter of award was allotted to the consortium of M/s. Patel Infrastructure Pvt. Ltd. and Katira Construction Ltd and thereby appellant failed to fulfill the requirement of provision of section 80IA(3) of the Act.*

- *that the appellant has not constructed any new infrastructure facility as narrated and defined in the Board's circular referred to in the Circular No.4/2010 [F.No. 178/14/2010-IT(A-I) dated 18.05.2010].*

- *that the letter of award was granted to the consortium of M/s. Patel Infrastructure Pvt. Ltd. and M/s. Katira Construction Ltd. on 08.09.2009 and as per the said letter the assessee was supposed to operate and maintain an already existing road constructed prior to letter of award granted to the company which implies that appellant did not carry out the construction of any new infrastructure of any new infrastructure facility within the meaning of section 80-IA(4) of the Act.*

6,2. *On the basis of the above, four broad features, the AO concluded that the appellant had wrongfully claimed deduction u/s. 80IA (4). The AR of the appellant submitted that the project in question is one stretch of road at National Highway [NH] 14 of Palanpur - Radhanpur section from 340 Km to 458 Km and at NH 15 between Radhanpur- Samkhiyali*

section 138.80 Km to 281.30 Km. The AR of the appellant further submitted that this road was originally developed and constructed in FY 2008-09 and operated and maintained by National Highway Authority. Subsequently, NHAI decided to carry out maintenance of this highway, for which it invited proposals by its request for Qualification [RFQ] No.1 dated 19.09.2008. From the copy of proposal (forming part of the paper book), it is seen that the bid was to Operate, Maintain a Transfer. The successful bidder was Consortium of Patel Infrastructure P Ltd 2 Katira Construction Co. The bid documents revealed that the selected bidder who is either a company incorporated under the companies Act, 1956 or a "Concessionaire" shall be responsible for operation and maintenance of the Project and in accordance with the provisions of the concession agreement to be entered into between selected bidder and the NHAI. Accordingly, a "Concessionaire" was incorporated in the form of a limited liability company in the name of M/s Patel High Management Pvt. Ltd [the appellant] on 24.09.2009, commonly termed as Special Purpose Vehicle [SPV]. The share of both the consortium companies was 74 % and 26 % of shares in the formed SPV. Then the consortium requested NHAI to accept the concessionaire (viz., the appellant) as the entity which shall undertake perform the obligations and exercise the rights of the holding companies under LOA. All these documents are forming part of the paper book.

6.2.1 Thereafter, **NHAI entered into a Concession Contract agreement with appellant** for implementation of the project. The period specified therein was years commencing from Commercial Operation date (COD) and it was to last till 26.04.2019. The terms were to Operate, maintain and Transfer [OMT] basis. Accordingly, all rights, duties and liabilities for the implementation of the project were stand transferred to the appellant. This is seen from the agreement copy, which is also forming part of the paper book.

6.2.2 Now, on the basis of the above factual aspect, the learned AR contends that, since the appellant entered into an Agreement with the Authority as specified in clause (b) of sub section 4(1) of Section 80IA, the prime facie the condition lay down in section 80IA (4)(i) stands discharged for the appellant as against one of the finding of the AO while denying the claim of deduction u/s. 80IA(4).

6.3 According to section 80IA(4)(i)(a),(b), and (c) 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 conditions viz., it is owned by a company registered in India or by a consortium of s companies and has entered into an agreement with the Central Government 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 infrastructure facility and it has started or starts operating and maintaining infrastructure facility on or after the 1st day of April, 1995, shall be eligible for deduction. The AO alleges that the contract was awarded to the consortium of Patel Infrastructure Pvt. Ltd. and M/s. Katira Construction Ltd on the basis of evaluation of the financial and technical capacity of both the companies and not be the appellant. However, as per the terms and conditions of the bidding, consortium on successful bid, has to register a "Concessionaire" for implement; of project obligations. On receipt of letter of allotment, the consortium companies promoted and incorporated a "Concessionaire" in the name and style of M/s Patel Highway Management Pvt. Ltd, [the assessee] on 24.09.2009. Thus, the assessee came into existence only after the successful bidding by consortium companies, was intimated to the NHAI vide letter dated 25.9.2009, which is forming part of a paper book. Thus, there is nothing wrong in the formation of the appellant and the same was as per norms. In fact, it is seen that, on completion of procedure of all the bidding conditions, **NHAI entered in to a Concession Contract Agreement with the appellant company on 23.10.2009. Thus, the concession agreement was made by the NHAI with the appellant company.** Hence, the AO's finding on this score (which led to denial of claim of deduction) stands nullified.

6.4 The AO also alleged that the appellant company was not even in existence when the letter of award was allotted to the consortium of M/s. Patel Infrastructure Pvt. Ltd. and Katire Construction Ltd. and thereby appellant failed to fulfill the provision of section 80IA (3) of the Act. However, as discussed supra, both the bidding companies were individually qualified within the meaning of section 80IA(3) and there is no dispute about it. As per the bid terms, on receiving the project the consortium has to float the Special Purpose Vehicle under the companies Act and accordingly Patel Highway Management Pvt. Ltd. [PHMPL] was incorporated who has to execute the work in term of agreement with NHAI. So obviously the appellant would not have taken birth when the bid process was in progress. NHAI entered into concession agreement with the appellant company on 23.10.2009 and not with the consortium companies. Therefore, this finding also fails to survive.

6.5 further held that, the appellant has not constructed any new infrastructure facility as narrated and defined in the Board's circular referred to in the Circular No.4/2010 [F.No. 178/1 4/2010-1T(A-I) dated 18.05.2010.]. This is one of the main contention of the AO. However, plain reading of the provisions of Sec.80IA(4) reveals that, the same is applicable to "any enterprise carrying on the business of (i) developing, ii) maintaining and operating or (iii) developing, maintaining and operating or development, maintenance and operating any infrastructure facility. Thus, an enterprise which is engaged in any of the three activities is eligible for deduction. With the introduction of the new Section 80IA(4) amending the sub section (4) of section 80IA and deleting the sub section (4A), the legislature provided deduction for any enterprise carrying on the business either developing or operating and maintaining or development, operating and maintaining instead allowing deduction only to the enterprises engaged in activity covering all the three activities together. Thus the provision extended to an enterprise carrying on any one of the three activities and there is no ambiguity to this. The legislature specifically added the conjuncton 'OR' between the words (developing), (operating and maintaining) the (developing, operating and maintaining), which means, the provision would apply to any enterprise carrying on the business of developing or carrying on the business of operating and maintaining or carrying on the business of development, operating and maintaining the infrastructure facility. The Bombay High Court in the case of CIT vs. ABG Heavy Industries Ltd. [2010] 322 ITR 323/189 taxman 54 had held that the three conditions development, operation and maintenance were not intended to be cumulative in nature

6.6 Furthermore, for operating and maintaining any infrastructure facility, first of all there should have been existing facility as such and then and then question of operating and maintenance comes into play. The present project on hand relates to 'Operate, Maintain and Transfer' [OMT] the existing road at Palanpur – Radhanpur – Samakhiali Section of NH 14 and NH 15 in state of Gujarat. Thus, the provisions of section 80IA (4)(i), sub-clause (ii) would be applicable. Since the award was for operating and maintenance of already developed and constructed infrastructure facility as such the question of construction of any new infrastructure facility within the meaning of section 80-IA(4) of the Act does not arise. Therefore, since the very provisions of section 80IA (4) enables operating, maintenance, transfer and as these three are not cumulative in nature, the appellant is eligible for the claim of deduction. This finding gets support from the decision of ITAT, Agra Bench in the case of PNC Construction Co. Ltd. vs. Dy CIT[2013] 37 taxmann.com 361 (Agra-Trib) cited supra.

6.7 In the light of above discussion, the AO is directed to allow the appellant the claim of deduction so made by it under section 80IA(4). Hence, this ground of appeal is allowed.

13. From above discussion and findings of "Ld.CIT (A)" we find that the two issues needs adjudication:-

1. Whether existence of M/s.Patel Highway Management Pvt. Ltd. was necessary at the time of issuance of "Letter of Award" (LOA) by "NHAI" to the consortium of PIPL and KCL.
2. Whether deduction u/s.80IA(4) of the Act is available for the contracts awarded for operation, maintenance and transfer of existing roads.

14. Apropos to issue no.1, we find that even though LOA was awarded to the consortium of two companies i.e PIPL and KCL by "NHAI" on 08/09/2009, subsequent thereto after the application of the two companies (part of the consortium) on 25/09/2009, requesting NHAI to authorize the assessee's company to execute the "concession agreement" being a "special purpose vehicle" incorporated by the consortium companies to undertake the OMT Project. NHAI accepted the application of both the companies and entered into "concession agreement" on 23/10/2009, mentioning all details about the project inter alia consisting of Article 1 to Article 15 as shown in the paper book from page 31 to 76.

15. From going through the "concession agreement" dated 23/10/2009, we find that NHAI has given the complete contract to assessee itself incorporating all types of work to be carried out by the assessee (which is a consortium of two companies namely PIPL and KCL). At this juncture we find it necessary to quote the relevant portion of the judgment of Hon'ble High Court of Allahabad in the case of CIT Vs Pnc Construction Pvt. Ltd.(supra) adjudicating the issue of allowability of deduction u/s.80IA(4) of the Act to "joint venture" or "special private venture" observing as follows:

7. We heard both the parties at length and gone through the materials available on record.

8. The question no. 1 is not emerging from the impugned order. In remaining questions, the substantial issue is regarding the dis-allowance under Section- 80IA as the dis-allowance was made by the C.I.T.(A.). From the record, it transpires that the A.O. as well as Tribunal had allowed the claim of the assessee. Section-80IA(i)(a) on the reproduction as under: —

"(a) it is owned by a company registered in India or by a consortium of such companies."

9. The statutory provision under Section-80IA(4) states that where the total income of the assessee includes any profit and gain from the enterprises i.e. joint venture or Special Private Venture (S.P.V.) carrying on the defined business of developing or operating or maintaining any infrastructure finally then assessee would be liable for deduction. It is also provided that the project should be owned by the company or consortium of companies, who got the contract from the State, as mentioned in Article-12 of the Constitution. But this facility is available only w.e.f. 01.04.1995, as per the amended provision and for the assessment year it is applicable. When it is so. then we find no reason to interfere with the impugned order passed by the Tribunal. The same is hereby sustained alongwith the reasons mentioned therein.

10. Answer to the substantial questions of law is in favour of the assessee and against the department.

11. In the result, the appeal filed by the department is dismissed.

16. Examining the facts of the case in appeal before us with those adjudicated by Hon'ble High Court of Allahabad in the case of CIT vs Pnc Construction Co. Ltd.(supra), we find that the issue is squarely covered by this judgment as the assessee in his appeal i.e M/s.Patel Highway Management Pvt. Ltd. is also a "Special Private Venture" of the consortium of two companies i.e PIPL and KCL which were issued "Letter of Award" by NHAI.

17. Respectfully following the judgment of Hon'ble High Court, Allahabad, referred above and in the given facts and circumstances, we are of the confirmed view that it was not necessary for the assessee to be in existence on the date of issuance of "Letter of Award" by "NHAI" because subsequently the consortium of two companies have specifically incorporated the assessee's company as a special purpose vehicle to undertake "OMT projects" given by "NHAI" to assessee through "concession agreement". Therefore assessee is covered under the category of "Enterprise" eligible for deduction u/s.80IA(4) of the Act.

18. Now coming to the second issue, as to, whether deduction u/s.80IA(4) of the Act is limited only to new infrastructure facilities, we find it pertinent to peruse the following relevant portion of section 80IA(4)(i) of the Act:-

(i) any enterprise carrying on the business ³⁷[of (i) developing or (ii) operating and maintaining or (Hi) 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;]

³ [(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 (ii) 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:

19. The above provision contemplates that the "eligible business" for claiming the impugned deduction u/s.80IA(4) of the Act consists of developing, operating and maintaining infrastructure facilities. The word "maintaining" appearing in the provision, itself connotes that it is for maintaining of existing infrastructure facilities (which in this case is for maintenance of roads) and is therefore covered under the provisions of section 80IA(4) of the Act).

20. We are therefore of the view that, it is not mandatory to construct any new infrastructure facilities in order to claim deduction u/s.80IA(4) of the Act, even the work of operating and maintaining of existing infrastructure facilities are also covered under the category of "business" referred in section 80IA(4) of the Act.

21. We therefore in the given facts and circumstances of the case are of the view that assessee has rightly claimed the deduction u/s.80IA(4) of the Act of Rs.7,73,77,928/-. We therefore find no infirmity in the findings of "Ld.CIT (A)" Ground no.1 of the Revenue is dismissed.

10.1 Before us, no material has been placed on record by the Revenue to demonstrate that the decision of Tribunal as discussed above has been set aside / stayed or overruled by the Higher Judicial Authorities. Before us, Revenue has not placed any material on record to point out any distinguishing feature in the facts of the case for the year under consideration and that of earlier year nor has placed any contrary binding decision in its support. Thus, respectfully following the order

this tribunal in the own case of assessee, we uphold the finding of the learned CIT(A). Thus, the ground of appeal raised by the Revenue is hereby dismissed.

11. In the result, the appeal filed by the Revenue is **dismissed**.

Order pronounced in the Court on 11/11/2022 at Ahmedabad.

Sd/-
(T.R SENTHIL KUMAR)
JUDICIAL MEMBER
(True Copy)

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 11/11/2022
Manish