

आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

ITA No.593/Hyd/2017		
Assessment Year: 2009-10		
Ramky Infrastructure Ltd, Hyderabad. PAN:AAACR8627B	Vs.	Joint Commissioner of Income Tax, Circle 3(1), Hyderabad.
(Appellant)		(Respondent)
Assessee by:	Shri A.V. Raghuram.	
Revenue by:	Shri Jeevan Lal Lavidiya, DR	
Date of hearing:	15/11/2022	
Date of pronouncement:	28/11/2022	

ORDER

Per Laliet Kumar, J.M

This appeal filed by the assessee is directed against the order of the learned CIT (A)-12 dated 16.11.2016 relating to A.Y.2009-10 u/s 143(3) of the I.T. Act, 1961.

2. The assessee has raised the following grounds of appeal:

“1.The order of the learned CIT(A) is erroneous both on facts and in law.

2. The learned CIT(A) erred by deciding the appeal treating the disputes raised therein as subsisting as on the date of disposal of such appeal. On the facts and in the circumstances of the case and in law, he ought to have treated the appeal pending before him as infructuous.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to appreciate that, Consequent on a Search & Seizure operation conducted u/s 132 of Income Tax Act after completion of the original assessment, a fresh assessment was made for the assessment year under appeal, vide order u/s 143(3) r.w.s. 153A dt.31.03.2015, after examining all the issues including the disallowances/denials made in the impugned original assessment thereby resulting in the merger of such original assessment with the fresh assessment and, as such, the proceedings before him against the original assessment were infructuous not calling for any adjudication.

WITHOUT PREJUDICE TO THE ABOVE GROUNDS:

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred by confirming the disallowance of the deduction claimed by the Appellant under section 80IA in respect of profits derived from the eligible business of developing infrastructure facility. He ought to have appreciated that, tested on the principles laid down by the judicial authorities, the appellant company was the developer of infrastructure facility, as defined in Explanation to Section 80IA(4)(i). and accordingly was eligible for deduction in respect of profits derived therefrom.

5. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred by not following the decisions of the jurisdictional bench of Hon'ble ITAT and various other judicial authorities in a number of cases, including the Appellant's own case for A.Y.2003-04 to 2008-09, wherein, after an elaborate analysis of the relevant provisions, it was held that the profit derived from developing infrastructure projects was entitled to deduction u/s 80IA. He ought to have considered the fact that after thoroughly examining the Appellant's claim, in terms of the guidelines laid down by the Hon'ble ITAT in the Appellant's own case for earlier years, only a sum of Rs.4,74,274/ was disallowed by the Assessing Officer vide the subsequent re-

assessment order u/s 143(3) r.w.s. 153A dt.31.03.2015 and accordingly he ought to have restricted the impugned disallowance to Rs.4,74,274/.

6. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred by not adjudicating on the Appellant's ground relating to the error committed by the Assessing Officer by not allowing credit for the TDS as per the relevant provisions of the Act.

7. Any other ground or grounds as may be urged at the time of hearing”.

3. The learned Counsel for the assessee submitted the following written submissions:

“1. In the present case, the AO passed assessment orders for asst. years 2003-04 to 2009-10 on various dates denying the benefit of deduction under section 80IA of the Act to the Appellant. The assessment order for asst. year 2009-10 in particular was passed on 11.11.2011. The Appellant was not successful in the appeals filed before the Commissioner of Income Tax (Appeals) for the assessment years 2003-04 to 2008-09 and preferred further appeals to this Tribunal viz.. ITA. No.472 to 475/Hyd/2009 (for asst. years 2003-04 to 2006-07) & ITA.Nos. 1906 & 1668/Hyd/2011 (for asst. years 2007-08 and 2008-09). However, the appeal relating to assessment year 2009-10 was pending on the file of the ld. Commissioner of Income Tax (Appeals).

2. The Hon'ble Tribunal while dealing with the batch appeal of the assessee for Asst. years 2003-04 to 2008-09 considering the facts and orders/judgements discussed at paragraph 14 and 15 of the order, disposed of the batch appeal vide common order dated 17.07.2013 with the following directions in paragraph 16 of its order:

"16. Being so, in our opinion, it is appropriate to remit the entire issue back to the file of the Assessing Officer to examine the issue afresh after considering the contract document as a whole and all other evidence that may be submitted by the assessee to demonstrate the fact that the assessee has actually developed the infrastructure facilities by undertaking the activities of design, development, engineering, construction, maintenance, financial involvement, defect correction of the contract during the warranty period. If the assessee will be able to establish such facts by supporting evidence, then, the assessee would be entitled to the deduction under section 80IA(4) of the Act. With the aforesaid observations, we set aside the order of the CIT(A) and direct the Assessing Officer to decide the issue afresh by keeping in view of our observations made hereinabove. Needless to

mention, that the Assessing Officer shall afford a reasonable opportunity of being heard to the assessee."

3. In the meanwhile, there was a Search and Seizure operation under section 132 of the Act on 07.02.2013. Simultaneously, the AO while giving effect to the observations of the Hon'ble Tribunal examined the issue afresh after calling for the de tails from the assessee. The AO while passing the consequential orders for asst. years 2003-04 to 2008-09 pursuant to remand from Hon'ble Tribunal and couple of assessments pursuant to search and seizure operation under section 153A of the Act, considered the facts and evidence filed on record in detail and gave finding in respect of each of the agreements. The AO quantified the relief allowable and the disallowance to be made for assessment years 2003-04 to 2008-09. The assessment orders so passed have become final.

4. In respect of the assessment year 2009-10, the AO issued notice under section 153A of the Act and passed the assessment order dated 31.03.2015 under section 143(3) r.w.s. 53A of the Act. In this order, the AO has considered the claim of deduction under section 80IA of the Act as he did in respect assessment years 2003-04 to 2008-09. The AO had called for complete details of the claim made and examined the same in the light of the provisions of the Act. The AO, like other asst. years from 2003-04 to 2008-09, had considered each and every agreement thread bare and gave his findings quantifying the relief allowable and the disallowance to be made. This order has also become final in the sense that there is no order under section 263 nor under section 147 of the Act disturbing the quantification made by the AO with respect to the deduction allowable under section 80IA of the Act.

5. In the appeal proceedings which are pending against the original assessment dated 11.11.2011 made under section 143(3) of the Act, the Appellant submitted letter dated 01.11.2016 to the ld. CIT(A) bringing notice of the ld. CIT(A) the subsequent order dated 31.03.2015 passed by the Assessing Officer under section 143(3) r.w.s. 153A of the Act. The Appellant submitted to the ld. CIT(A) that the earlier order of the AO passed under section 143(3) of the Act would abate. The Appellant in other words submitted to the ld. CIT(A) that the original assessment order would merge with the fresh assessment made under section 143(3) rws. 153A of the Act as the subject matter in both the orders remains the same, and therefore the appeal becomes infructuous. The ld. CIT(A) considering the submissions filed on record by the Appellant and the letter dated 01.11.2016 submitted on behalf of the Appellant held that the assessment order originally passed under section 143(3) of the Act would not abate. The ld. CIT(A), as is apparent, without considering the findings given by the AO in the assessment order passed under section 143(3) rws 153A of the Act went by the observations made by the AO in the original assessment order. The ld. CIT(A)

without looking into the contents of the agreements simply upheld the assessment order impugned before him.

6. The present appeal is against the order of the ld. CIT(A) upholding the assessment order dated 11.11.2011 passed under section 143(3) of the Act for assessment year 2009-10. It is submitted that, considering the factual gamut of the case, the assessment order dated 31.03.2015 passed under section 143(3) rws 153A of the Act for assessment year 2009-10 that the Assessing Officer had examined the legality of the claim made under section 80IA of the Act and reached a conclusion that the Appellant is entitled to deduction to an extent of Rs.36,51,34,249. It is submitted that the AO also disallowed claim to an extent of Rs.4,74,2747.

7. It is submitted that the assessment passed on 11.11.2011 under section 143(3) of the Act by the AO got merged with the subsequent reassessment order passed subsequently on 31.03.2015 under section 143(3) rws 153A of the Act. It is further submitted that the order passed under section 143(3) r.w.s. 153A of the Act has become final for all practical purposes as there was no revision u/s 263 nor reopening done u/s 148 of the Act. It is submitted that the Appellant vide letter dated 01.11.2016 filed before the learned CIT (A) brought to the notice of the ld. CIT(A) that the development in the form of asst. order dated 31.03.2015 passed under section 143(3) rws 153A of the Act, in his order.

8. It is submitted that the ld. CIT(A) without considering the above development sustained the observations in the original assessment order dated 11.11.2011 in respect of very same claim made by the Appellant under section 80IA of the Act. It is submitted that there are two asst. orders in respect of the very same year and in respect of very same claim made under section 80IA of the Act, the earlier order dated 11.11.2011 denying the claim and the later order dated 31.03.2015 allowing the claim after detailed discussion. It is submitted that as per the latter order passed under section 143(3) rws 153A of the Act, the Appellant is entitled to deduction under section 80IA to an extent of Rs.36,51,34,249.

9. It is submitted that on the facts of the present case, there is a merger of assessment order passed under section 143(3) of the Act dated 11.11.2011 with that of the later order passed under section 153A r.w.s. 143(3) of the Act on 31.03.2015. It is submitted that on the facts and circumstances and having regard to the fact that the stand of the Revenue allowing deduction under section 80IA of the Act has become final by virtue of efflux of time in respect of the assessment order dated 31.03.2015 passed under section 143(3) rws 153A of the Act, it is submitted that the AO, as Respondent in the present appeal, cannot oppose the claim of Appellant for deduction under section 80IA of the Act to the extent it was allowed in the asst. order dated 31.03.2015

passed under section 143(3) rws 153A of the Act. It is submitted that the Revenue can never raise demand as it had accepted the same in the order passed under section 143(3) rws 153A of the Act, and which was allowed to become final by the Revenue.

10. Having regard to the above factual gamut of the case and the legal implications involved by virtue of the multiple orders passed by the Revenue in respect of the same claim for the same assessment year, it is submitted that the assessment order dated 31.03.2015 passed under section 143(3) rws 153A of the Act would hold the ground, as being passed on a later date considering the claim in detail. It is submitted that the order passed by the ld. CIT(A) is erroneous in as much as he failed to look into the assessment order dated 31.03.2015 passed under section 143(3) rws 153A of the Act for the assessment year 2009-10.

It is therefore prayed that the appeal of the Appellant may be allowed setting aside the orders of both the authorities below which are impugned in the present proceedings.”

4. Besides the above, the learned AR for the assessee drew the attention of the Bench to the order of the learned CIT(A) wherein the learned CIT(A) dealt with the contention of the assessee with respect to the determination of the same issue by the Assessing Officer u/s 153A for the same A.Y and has granted relief to the assessee. The relevant portion of the order of ld.CIT(A) reads as under :

“4.2 During the initial stages/course of the appellate proceedings, as indicated in earlier paras, the appellant's authorized representative shown to have filed submissions on the assessee's eligibility for deduction u/s.801A, vide letter dtd.17-08-2012, filed before the CIT(A)-IV, Hyderabad. However, the appeal has been transferred to CIT(A)-12, Hyderabad subsequently and the appellant was accorded ample opportunities from this office, to present their stand, for which there was no response from the appellant, till date. However, vide letter dtd.01-11-2016, the appellant's AR vide letter filed in this office in tappal on 10-11-2016, it has been submitted that in pursuant to the action under Sec.132 dtd.07-02-2013, in the case of the appellant, the original order under Sec.143(3) dtd.11-11-2011, is to be treated as abated in terms of Sec. 153A and 153C, with a fresh assessment was completed Consequently, for the impugned Assessment Year, under se. 143(3) r.w.s. 153A of the Income-tax Act, 1961 on 31-03-2015 and in view of the abatement of the original Assessment

Order and its merger with the fresh assessment consequent to action under Sec.132 and Sec.153A, the present appeal becomes infructuous. Accordingly, it was prayed to dispose off the appeal as infructuous.”

5. The contention of the learned AR for the assessee is that the assessee is a dominus litus and is entitled to withdraw the appeal after getting relief from the Assessing Officer in search proceedings u/s 153A of the Act. It was submitted that once the assessee had requested the learned CIT(A) to permit the assessee to withdraw the appeal, then it was incumbent upon the ld.CIT(A) not to proceed with the determination of the issue on merit and should have dismissed the appeal being as withdrawn. Further, it was the contention of the assessee before us that the issue of the determination of the benefit u/s 80IA was under litigation for the previous and subsequent assessment years. The Tribunal in the case of the assessee has directed the Assessing Officer to consider the projects/development agreements of the assessee and pass a detailed speaking order vide order dated 17.07.2013. Our attention was drawn to Para 16 of the order at page 39 of the Paper Book to the following effect:

“16. Being so, in our opinion, it is appropriate to remit the entire issue back to the file of the Assessing Officer to examine the issue afresh after considering the contract document as a whole and all other evidence that may be submitted by the assessee to demonstrate the fact that the assessee has actually developed the infrastructure facilities by undertaking the activities of design, development, engineering, construction, maintenance, financial involvement, defect correction of the contract during the warranty period. If the assessee will be able to establish such facts by supporting evidence, then, the assessee would be entitled to the deduction under section 80IA(4) of the Act. With the aforesaid observations, we set aside the Order of the CIT(A) and direct the Assessing Officer to decide the issue afresh by keeping in view of our observations made hereinabove. Needless to mention, that the Assessing Officer shall afford a reasonable opportunity of being heard to the assessee.

17. In the result, all the appeals of the assessee are allowed for statistical purposes.”

6. The Assessing Officer after complying with the directions of the Tribunal had granted relief to the assessee vide letter dated 31.3.2015 passed for the A.Ys 2003-04 to 2006-07. Since in this case, the search has taken place in the premises of the assessee on 07.02.2013, thereafter, the Assessing Officer had adjudicated the assessment years i.e., 2007-08 to 2013-14 falling within the search assessments. For all these A.Ys, the Assessing Officer had granted part relief to the assessee vide order dated 31.3.2015. It was the contention of the assessee that the original order passed by the Assessing Officer which was the subject matter of the present appeal dated 11.11.2011 ceased to exist on record and the only subsequent order is amenable for challenge, if any, as the order was passed u/s 143(3) r.w.s. 153A for the A.Y 2009-10. In the light of above, it was contended that the learned CIT(A) should not have adjudicated the issue on merit once the order of the Assessing Officer has stands merged with the subsequent order and the relief has been granted to the assessee.

7. Per contra, the learned DR relied upon the order passed by the learned CIT (A). Though, the learned DR has cited many decisions during the course of the argument, however, in the case file, the following judgments have been found to have been filed:

- i) Hon'ble Supreme Court in the case of Plastiblends India Ltd (86 taxmann.com 137)
- ii) Hon'ble Bombay High Court in the case of EBR Enterprises (107 taxmann.com 220)
- iii) Hon'ble Delhi High Court in the case of Kabul Chawla (61 taxmann.com 412)

- iv) Hon'ble Rajasthan High Court in the case of Jai Steel (India) (36 taxmann.com 523)
- v) Hon'ble Gujarat High Court in the case of Katira Construction Ltd (31 taxmann.com 250).

8. We have heard the rival arguments made by both the sides and perused the material available on record. Firstly, we deal with the issue whether the learned CIT(A) should have decided the issue on merit after receiving the request from the assessee to withdraw the appeal being infructuous on account of the relief granted by the Assessing Officer vide order dated 31.3.2015. In this regard, it is essential to look into the substantive provision namely section 246A of the I.T. Act, 1961, which reads as under :

“246. (1) Subject to the provisions of sub-section (2), any assessee aggrieved by any of the following orders of an Assessing Officer (other than the Deputy Commissioner) may appeal to the Deputy Commissioner (Appeals) before the 1st day of June, 2000 against such order—

(a) an order against the assessee, where the assessee denies his liability to be assessed under this Act, or an intimation under sub-section (1) or sub-section (1B) of section-143, where the assessee objects to the making of adjustments, or any order of assessment under sub-section (3) of section-143 or section-144, where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed;

.....”

9. From the reading of the above provision, it is abundantly clear that an appeal lies to the Id.CIT(A) if an assessee is aggrieved by any of the order/s passed by the Assessing Officer. In the present case, once the grievance of the assessee has been decided in favour of the assessee by the

subsequent order passed by the Assessing Officer on 31.3.2015 u/s 143(3) r.w.s. 153A for the same assessment year, then the assessee was left with no grievance whatsoever against the order passed by the Assessing Officer. In the light of the above, in our opinion, assessee was within his right to seek withdrawal of the appeal, as the appeal became infructuous and the learned CIT (A) should not have embarked the appeal on merit. We may draw the analogy from order XXIII Rule 1 of Civil Procedure Code wherein the appellant has a liberty to withdraw or abandon the suit against the defendant with or without liberty, the same principle is equally applicable in the case of appeal also under C.P.C. Thus, in view of order XXIII Rule 1 of CPC, once the assessee opted to withdraw / abandon the appeal with or without liberty, then the Court shall permit the assessee to withdraw the suit/ appeal. However, if the plaintiff / appellant seeks the liberty, the same may or may not be granted by the court, however, it is not permissible in law for the competent court to continue with the hearing of the suit / appeal, in case the application for withdrawal has been filed by the plaintiff / assessee and to decide the issue on merit. Further, if we look into the facts of the present case, in this case, as is clear from Para 4.2 of the order of ld.CIT(A) (supra) the assessee had filed a letter seeking permission to withdraw the appeal on 01.11.2016 and thereafter, the learned CIT (A) had passed the order on 16.11.2016 without permitting the assessee to withdraw the appeal. It is not the case of the Revenue that the hearing before the ld.CIT(A) have been concluded and the matter has been reserved for order. In view thereof, the assessee was well within the time to avail his statutory right to withdraw the appeal as the assessee was aggrieved by the order passed by the Assessing Officer. In our opinion, the order passed by the learned CIT (A) deciding the issue on merit after the relief was granted to

the assessee for the same issue in the subsequent proceedings and therefore, the order of Id.CIT(A) is without any basis and is contrary to law and hence, we quash the same.

10. There is yet another reason to decide the issue in favour of the assessee as mentioned herein above that the projects of the assessee were continuing right from the A.Y 2003-04 to 2013-14 and for all the years prior to A.Y 2009-10 and thereafter, the assessee was granted relief by the Assessing Officer. In our view, the Revenue is not permitted to take contrary position as taken by it with respect to the same projects and contracts and therefore, once the Assessing Officer in the facts of the present case come to the conclusion that the assessee is entitled to the benefit of section 80IA for the projects which are subject matter prior to the subsequent A.Y and therefore, the CIT (A) should not have taken a contrary view and taken a decision against the assessee and hence, the assessee is entitled to relief in law and on facts. Hence, the appeal of the assessee is allowed.

11. We may point out that none of the decisions cited by the Id.DR for the Revenue are applicable to the present set of controversies before us.

12. In the result, appeal filed by the assessee is allowed.

Order pronounced in the Open Court on 28th November, 2022.

Sd/- (R.K. PANDA) ACCOUNTANT MEMBER	Sd/- (LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 28th November, 2022.

Vinodan/sps

Copy to:

S.No	Addresses
1	Ramky Infrastructure Ltd, 15 th Floor, Ramky Grandiose, Ramky Towers Complex, Gachhibowli, Hyderabad-33
2	Dy.CIT, Central Circle -2(4), Aayakar Bhavan, Basheerbagh, Hyderabad
3	CIT (A)- 12,Hyderabad
4	Pr. CIT-Central, Hyderabad
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order