

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

[CONDUCTED THROUGH VIRTUAL COURT]

**Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 114/Rjt/2018
Assessment Year 2012-13**

The Dy. CIT, Circle-2(1), Rajkot (Appellant)	Vs	M/s. Backbone Enterprise Ltd., Backbone House, M-43, Gujarat Housing Board, Kalawad Road, Rajkot-360001 PAN: AABCB9255E (Respondent)
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**Assessee by: Shri D.M. Rindani, A.R.
Revenue by: Shri Shramdeep Sinha, Sr. D.R.**

Date of hearing : 25-04-2023
Date of pronouncement : 16-05-2023

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This Revenue's appeal for A.Y. 2012-13, arises from order of the CIT(A)-11, Ahmedabad dated 08-01-2018, in proceedings under section 250 of the Income Tax Act, 1961; in short "the Act".

2. The Department has taken the following grounds of appeal:-

“1. The Ld. CIT(A)-11, Ahmedabad has erred in law and on facts in deleting the disallowance made u/s. 80IA(4) of the Income Tax Act, 1961 of Rs. 1,61,47,208/-.

2. That on the facts and in the circumstances of the case, the Ld. CIT(A)-11, Ahmedabad ought to have upheld the assessment order of the Assessing officer.”

3. Before us, the Id. Departmental Representative submitted that looking into the facts of the case, the Id. CIT(A) has erred in deleting the disallowance made u/s. 80IA of the Act of Rs. 1,61,47,208/-. The primary thrust of the arguments of Id. Departmental Representative was that the benefit of section 80IA(4) has to be granted only to “developer” and such benefit is not meant to be extended to “a contractor/works contractor”. The Id. Departmental Representative submitted that the primary difference between the two is that a “developer” makes an investment in the project and does not get paid by the Government while the “works contractor” get paid directly by the awardee of the work. Thus, the requirement of “investment by the person” is an essential condition for eligibility of claim of deduction u/s. 80IA(4) of the Act. As per the Id. Departmental Representative such investment is equal to the cost of infrastructure project. The Government does not make investment of funds in such project. The Government makes simultaneous arrangement by way of a MOU and vests the right to collect user fee/tool fee with the developer for a necessary period of time. However, the above characteristics which defined “developer” are not seen

in the MOU in case the work is given under a works contractor arrangement. There is no vesting of right after completion of project to collect fee from users. In fact, at regular stages of completion of work, the payments are made by the Government to the works contractor. Accordingly, it was submitted that since in the instant facts, the assessee has not taken “investment” risk in the aforesaid projects. The assessee is not liable for the benefit of deduction u/s. 80IA(4) of the Act.

4. In response, the ld. counsel for the assessee submitted that the issue is covered by the order of ITAT Ahmedabad in assessee’s own case for assessment year 2011-12, wherein in respect of some of the projects, the ITAT granted relief to the assessee whereas in some of the projects, looking into the facts of the case, the ITAT was of the view that assessee was not eligible for deduction u/s. 80IA(4) of the Act. The counsel for the assessee submitted that the ld. CIT(A) has primarily relied upon the observations made in the order passed by ITAT Rajkot Bench in assessee’s own case for assessment year 2011-12. Accordingly, the counsel for the assessee requested that the ITAT may proceed to pass order on the same lines as the order for the immediately preceding assessment year 2011-12, since most of the projects are essentially a continuation from the previous years.

5. We have heard the rival contentions and perused the material on record. On going through the contents of the order passed by ld. CIT(A), against which the present appeal has been filed by the Department, we observe that the ld. CIT(A) allowed the appeal of the assessee for assessment year 2012-13 by following the order of his predecessor for assessment year

2011-12 and also the order of ITAT for assessee's own case for assessment year 2011-12 in ITA No. 129 and 150/Rjt/2015 dated 28-09-2022. However, on going through the order of the Assessing Officer and Id. CIT(A) for assessment year 2012-13, we observed that no details of deduction u/s. 80IA(4) of the Act in respect of individual projects was evident from the order passed by the Id. CIT(A) and Assessing Officer. Accordingly, we observed that there is no clarity as to what extent the observations made by ITAT, Rajkot Bench in assessee's case for assessment year 2011-12 is applicable to the facts of assessee's case for assessment year 2012-13. Accordingly, we sought details of individual projects which had been carried out by the assessee during the year under consideration and observations made by ITAT with respect to those projects in the order passed for assessment year 2011-12. On our request, both the assessee and the Department have filed details of projects undertaken by the assessee during the impugned assessment year and the observations made by the ITAT, Rajkot with respect to the said projects in the order passed for assessment year 2011-12. Table submitted by the assessee and the Department is reproduced below for ready reference.

"Details of projects for which deduction is claimed u/s. 80IA(4) during F.Y. 2011-12 relevant to AY 2012-13:-"

<i>Sr. No.</i>	<i>Name of project</i>	<i>Whether allowed by Hon'ble ITAT, Rajkot in AY 2011-12 vide order dated-28.09.2022</i>
<i>1*</i>	<i>Bhavnagar Irrigation</i>	<i>No</i>
<i>2**</i>	<i>BRTS Ring Road</i>	<i>Yes</i>

3*	<i>GIDC Halol</i>	<i>No</i>
4**	<i>GIDC Panoli</i>	<i>Yes</i>
5*	<i>GIDC Barnanbore</i>	<i>No</i>
6* j	<i>GIDC Veraval</i>	<i>No</i>
7**	<i>Sabli Dam</i>	<i>Yes</i>
8*** Estate	<i>GIDC Dahej Industrial</i>	<i>N/A (1st year of claim)</i>
9** Road	<i>GIDC Chemical Zone Dahej</i>	<i>Yes</i>
10**	<i>GIDC SEZ-1 Dahej</i>	<i>Yes</i>

Assessee is **found not eligible** for claim of deduction u/s. 801 A(4) vide order dated-28.09.2022 in ITA No.129 & 150/RJT/2015 for AY 2011-12. Assessee is **found eligible** for claim of deduction u/s. 80IA(4) vide order dated-28.09.2022 in ITA No.129 & 150/RJT/2015 for AY 2011-12. New project (not considered in earlier years)

This is a completely factual submission, notwithstanding contention raised in written submission dated-07.02.2023 and the findings that Ld. CIT(A) did not bother to go through the facts of case and the referred order of Hon'ble ITAT before allowing the appeal of the assessee.”

6. On going through the contents of the table, we observe that a total of 10 projects were undertaken by the assessee during assessment year 2012-13, out of which 9 projects were carried forward from the earlier assessment

year 2011-12. Accordingly, in respect of those nine projects, the observations made by ITAT vide order dated 28-09-2020 would apply and relief may be granted/denied as per observations made by ITAT, Rajkot in assessee's own case for assessment year 2011-12. However, we observe that during assessment year 2012-13, the assessee had undertaken a new project viz. GIDC Dahej Industrial Estate, on which deduction u/s. 80IA(4) was claimed by the assessee for the first time. Accordingly, the observations made by ITAT Ahmedabad for assessment year 2011-12 would not apply to such project and further the Id. CIT(A) has also not given any specific finding with respect to assessee's eligibility to claim deduction u/s. 80IA(4) of the Act with respect to such project. Accordingly, with respect to this project, the matter is being set aside to the file of Id. CIT(A) for his observations/conclusions regarding assessee's claim for deduction, after due opportunity of hearing to the assessee to place all necessary documents/agreement/information, which may be required to assess the assessee's eligibility for claim of deduction u/s. 80IA(4) with respect to the aforesaid project.

7. However, we are unable to agree with the contentions raised by the Id. D.R. for simple reason that the present projects cannot be compared with projects like Toll Plaza etc. where the assessee is later able to recover the cost of investment. Further, it is difficult to accept the proposition that in order to qualify as a "Developer", the entire cost of investment has to be borne by the "contractor" and only then he would be eligible to claim deduction u/s. 80-IA(4) of the Act. These additional conditions for claiming deduction u/s. 80-IV(4) is, in our view not having any basis.

8. In the result, the Revenue's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 16 -05-2023

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad : Dated 16/05/2023

Sd/-
(SIDHHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,
Income Tax Appellate Tribunal,
Rajkot