आयकर अपीलीय अधिकरण, हैदराबाद पीठ

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad

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

Appeal in ITA No	Revenue	Assessee	A.Y
1545/Hyd/2017	ACIT Circle 8(1) Hyderabad	Maytas NCC-JV, Hyderabad PAN:AALFM2137K	2006-07
1546/Hyd/2017	-do-	-do-	2007-08
1547/Hyd/2017	-do-	-do-	2008-09
1548/Hyd/2017	-do-	-do-	2009-10
494/Hyd.2016	-do-	-do-	2010-11
1198/Hyd/2017	-do-	-do-	2011-12
774/Hyd/2018	Maytas NCC-JV, Hyderabad PAN:AALFM2137K	ACIT Circle 8(1) Hyderabad	2013-14
690/Hyd/2018	-do-	-do-	2014-15

Assessee by:	Shri S. Rama Rao, Advocate
Revenue by:	Dr. Rajendra Kumar, CIT(DR)
Date of hearing:	30/05/2023
Date of pronouncement:	30/05/2023

ORDER

Per Laliet Kumar, J.M

The above appeals are connected appeals filed by both the Revenue as well as the Assessee feeling aggrieved by the order passed by the learned CIT (A) in the above said appeals. Since identical grounds have been raised in all these appeals, for the sake of convenience, all these appeals were heard together and are being disposed of by this common order.

2. ITA No.1198/Hyd/2017 for the A.Y 2011-12 is taken as the lead case and the grounds raised by the assessee is reproduced below:

1*) The learned CIT (A) erred both in law and on facts*

2) The learned CIT (A) erred in holding that the projects undertaken by the assessee are infrastructural projects and not work contracts and hence the assessee is eligible for deduction u/s 80IA on the profits earned from such projects.

3) Any other ground that may be urged at the time of hearing".

3. At the outset, the learned DR drew the attention of the Bench to the order passed by the learned CIT (A), more particularly para 6, 6.5 and 6.6 of the order of the learned CIT (A) which is reproduced below:

6. I have considered the arguments of the assessee, have gone through the relevant facts of the case and the decision's relied upon. The Hon'ble ITAT while deciding the case of the assessee for Assessment Year 2007-08 vide order dated 27.08.2012 in ITA No. 1292/H/10 discussed various judicial decisions and the provisions of section 80IA. Quoting extensively from CBDT circular No. 14/2001 it was stated that the Act got amended w.e.f. 01.04.2002 to allow deduction under section 80IA to the enterprise engaged in developing or operating and maintaining or developing, operating and maintaining such infrastructure facility. The relevant portion of Hon'ble ITAT order is reproduced hereunder:

"On reading the above section and the notes on clauses / CBDT Circular it is very clear ~ that with effect from 1-4-2002 " the enterprises engaged in developing or operating and maintaining or developing, operating and maintaining such infrastructure are entitled to a tax holiday. Earlier to the above substitution there was no 'or' between the word M developing, (ii) maintaining and operating or (iii) developing, maintaining and operating, on entering into an agreement with Government would be eligible for deduction under section 801A."

6.1 Hon'ble ITAT also relied on its decision in case of Kaya & Co Construction (P) Ltd (2012 Taxpub (DT) 2005) wherein the Tribunal held that the enterprise carrying on development of infrastructure should be owned by the company and not that the infrastructure facility should be owned by the company. The relevant portion of the decision is reproduced hereunder:

"24. ... We find that the provisions of Section 80IA (4) of the Act when introduced afresh by the Finance Act, 1999, the provisions under section 80IA (4A) of the Act were deleted from the Act. The deduction available for any enterprise earlier under section 80IA (4A) are also made available under Section 80IA (4) itself. Further, the very fact that the legislature mentioned the words (i) "developing" or (ii) "operating and maintaining" or (iii) "developing, operating and maintaining" clearly indicates that any enterprise which carried on any of these three activities would become eligible for deduction. Therefore, there is no ambiguity in the Income-Tax Act. We find that where an assessee incurred expenditure for purchase of materials himself and executes the development work i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80 IA of the Act. In contrast to this, a assessee, who enters into a contract with another person including Government or an undertaking or enterprise referred to in Section 80 IA of the Act; for executing works contract, will not be eligible for the tax benefit under section 80 IA of the Act. We find that the word "owned" in sub-clause (a) of clause (1) of sub section (4) of Section 80IA of the Act refer to the enterprise. By reading of the section, it

is clears that the enterprises carrying on development of infrastructure development should be owned by the company and not that the infrastructure facility should be owned by a company. The provisions are made applicable to the person to whom such enterprise belongs to is explained in sub-clause (a). Therefore, the word "ownership" is attributable only to the enterprise carrying on the business which would mean that only companies are eligible for deduction under section 80IA (4) and not any other person like individual, HUF, Firm etc.

25. We also find that according to sub-clause (a), clause (i) of sub section (4) of Section 80-IA the word "it" denotes the enterprise carrying on the business. The word "it" cannot be related to the infrastructure facility, particularly in view of the fact that infrastructure facility includes Rail system, Highway project, Water treatment system, Irrigation project, a Port, an Airport or an Inland port which cannot be owned by any one. Even otherwise, the word "it" is used to denote an enterprise. Therefore, there is no requirement that the assessee should have been the owner of the infrastructure facility." (Emphasis Supplied)

From the above observations of the Hon'ble ITAT it can be seen that the assessee need not develop and operate the infrastructure facility. Either developing or operating would make the assessee eligible for deduction under section 80IA.

6.2 Similarly, the Hon'ble ITAT, in the case of Patel Engineering Co. Ltd., (94 ITD 411) held that if a person who only develops the infrastructure facility is not paid by the government the entire cost of development would be a loss in the hands of developer. When the legislature has provided that the income of the developer of the infrastructure project would be eligible for deduction, it presupposes that there can be income to the developer and obviously developer would have income only if he is paid for the development of infrastructure facility. Therefore, merely because the assessee is paid by government it cannot be denied deduction under section 80IA(4). The relevant portion of Hon'ble ITAT 's observations are as under:

"We have noticed above that the amendment brought in by the Finance Act, 1999 was with the sole intention/purpose of providing deduction under section 80-IA to the person, who only develops or who only maintains and operates an infrastructure facility. If a person who only develops the infrastructure facility is not paid by the government, the entire cost of development would be a loss in the hands of the developer as he is not operating the infrastructure facility. When the legislature has provided that the income of the developer of the infrastructure project would be eligible for deduction, it presupposes that there can be income to developer, i.e., to the person who is carrying on the activity of only developing infrastructure facility. Obvious as it is, a developer would have income only if he is paid for development of infrastructure facility, for the simple reason that he is not having the right/authorisation to operate the infrastructure facility and to collect toll therefrom, has no other source of

recoupment of his cost of development. Considered as such, we note that the business activity of the nature of "BT" (build and transfer) also falls within eligible construction activity that is activity eligible for deduction under section 80-IA inasmuch as mere "development" as such and unassociated/unaccompanied with 'operate' and 'maintenance' also falls within such business activity as is eligible for deduction under section 80-IA. In the case of such a construction activity, which does not involve the 'operate' aspect, the question of an assessee engaged in such activity (of "BT" carrying on only 'development') to recover his costs of construction of his own from the infrastructure project/facility itself does not arise, and so for the recoupment of the costs, the same have to be paid whether through running bills or otherwise; and considering the largeness/hugeness of the total financial investment involved, some advance if paid at some point of time, will not, in our view, change the baste nature/feature of the assessee's business activity. Therefore, merely because the present assessee was paid by the government, for development work, it cannot be denied deduction under section 80-IA(4) of the Act. The illustration of the artist, given by the assessee's counsel during the course of his arguments, is aptly illustrative and befitting. If an artist is asked to paint a beautiful picture and for such painting, payment is made by another person, the creator of the painting will be the artist and not the person who paid for it. We have also noted that the national water policy document furnished by the assessee, on p. 225 of its paper book-1, indicates the purpose for private sector participation. It states that private sector participation may help in introducing innovative ideas, generating financial resources and introducing corporate management and improving service efficiency and accountability to users. It is revealed from record, and has also not been disputed by the revenue that both the projects executed by the assessee were highly technical and specialised, as also extremely tricky and did involve huge risks as well. It is also revealed from record that for executing such projects, the assessee has deployed people, plant and machinery, technical expertise, know how and the financial resources as has also been the specific contention of the learned Authorised Representative of assessee as noted by us above." (Emphasis Supplied)

6.3 The Hon'ble ITAT also held that being a contractor does not derogate the assessee from being a developer as well. The term contractor is not essentially contradictory to the term developer. The relevant observation of Hon'ble ITAT are reproduced hereunder:

"There has also been the contention of the revenue that the assessee is a contractor, executing civil contract and so it cannot be the developer as such. However, we are unable to agree with this contention of the revenue. A person, who enters into a contract with another person will be a contractor no doubt; and the assessee having entered into an agreement with the Government of Maharashtra and also with APSEB for development of the infrastructure projects, is obviously a contractor but that does not derogate the assessee from being a developer as well. The term "contractor" is not essentially contradictory to the term "developer". On the other hand, rather section 80-IA(4) itself provides that assessee should develop the infrastructure facility as per agreement with the Central Government, State Government or a local authority. So, entering into a lawful agreement and thereby becoming a contractor should, in no way, be a bar to the one being a developer. The assessee, presently under consideration before us, has developed infrastructure facility as per agreement with Maharashtra State Government/APSEB. Therefore, merely because, in the agreement for development of infrastructure facility, assessee is referred to as contractor or because some basic specifications are laid down, it does not detract the assessee from the position of being a developer; nor will it debar the

assessee from claiming deduction under section 80-IA(4). Discussed/considered as above, we hold that the assessee having carried out the work of constructing the abovementioned two projects, namely Srisailam Project and Koyna Project, as detailed above, is appropriately a developer of the said two infrastructure facilities, and in turn is entitled, and entitled justifiably, to claim deduction under section 80-IA(4)." (Emphasis Supplied)

From the above observations of the Hon'ble ITAT in the case cited above it can be seen that:

(a) Assessee need not be both developer and operator to claim 80IA deduction.
(b) Being a contractor need not be a bar for the assessee to be termed as developer.
(c) Only because the assessee is paid by the government to develop a facility does not bar it from claiming 80IA deduction.
(d) The infrastructure facility need not be owned by the assessee to claim 80IA deduction.

6.4 Having dealt with the aspect of as to whether developer can claim 80IA, not let us examine whether a developer who developed ony a part of the infrastructure project but not the entire facility will be eligible to claim the deduction or not. Hon'ble Bombay High Court in the case of ABG Henry Industries dealt with this aspect and categorically held that an assessee need not develop the entire facility to qualify for deduction under section 80IA. Developing part of the facility also would entitle the assessee to claim 80IA deduction. The relevant portion of Hon'ble High Court is as under:

***"19.** The obligations which have been assumed by the assessee under the terms of the contract are obligations involving the development of an infrastructure facility. Section 80-IA of the Act essentially contemplated a deduction in a situation where an enterprise carried on the business of developing, maintaining and operating an infrastructure facility. A port was defined to be included within the purview of the expression infrastructure facility. The obligations which the assessee assumed under the terms of the contract were not merely for supply and installation of the cranes, but involved a continuous obligation right from the supply of the cranes to the installation, testing, commissioning, operation and maintenance of the cranes for a term of ten years after which the cranes were to vest in JNPT free of cost. An assessee did not have to develop the entire port in order to qualify for a deduction under section 80-IA. Parliament did not legi slate a condition impossible of compliance. A port is defined to be an infrastructure facility and the circular of the Board clarified that a structure for loading, unloading, storage, etc., at a port would qualify for deduction under section 80-IA. The condition of a certificate from the Port Authority was fulfilled and JNPT certified that the facility provided by the assessee was an integral part of the port. The assessee developed the facility on a BOLT basis under the contract with JNPT. On the fulfilment of the lease of ten years, there was a vesting in the JNPT free of cost." (Emphasis Supplied)*

From the above observations of the Hon'ble High Court it becomes clear that though the assessee develops only part of the infrastructure facility it does not bar the assessee from claiming deduction under section 80IA.

6.5 Having considered the above aspects influencing the eligibility or otherwise of the assessee, let us now examine the Hon'ble ITAT directions in the assessee's own case for Assessment Year 2007-08 vide order dated 27.08.2012 in ITA No. 1292/H/2010 and whether the works carried out by the assessee fall within the criteria fixed by the Hon'ble ITAT. Quoting from the order in the case of Sushee Hitech Constructions Pvt Ltd., the Hon'ble ITAT held as under:

" ... The assessee should not be denied the deduction under section 80IA of the Act as the contracts involves, development, operating, maintenance, financial involvement, and defect correction and liability period, then such contracts cannot be called as simple works contract. In our opinion the contracts which contain above features to be segregated and on this deduction u/s. 80-IA has to be granted and the other agreements which are pure works contracts hit by the explanation section 80IA(13), those work are not entitle for deduction u/s 80IA of the Act. The profit from such contracts which involves development, operating, maintenance, financial involvement, and defect correction and liability period is to be computed by assessing officer on pro-rata basis of turnover. The assessing officer is directed to examine and grant deduction on eligible turnover as directed above."

6.6 On perusal of above observations of ITAT it can be seen that the profit from such projects which involves development, operating, maintenance, defect correction etc. cannot be called as simple works contracts. On perusal of assessment order it is seen that the assessee is carrying on the same projects which were being carried out in Assessment Year 2010-11. Similar disallowance was made in Assessment Year 2010-11 and Commissioner of Income Tax (A) – 4 vide order dated 18.01.2016, after extensively analysing the case of the assessee held that the projects being carried out by assessee are infrastructural projects and not work contracts. The relevant portion of Commissioner of Income Tax(A)'s order is reproduced hereunder:

" Keeping in view of the above, the case was examined. The appellant during the course of appeal proceedings, submitted the details of project name, by whom awarded, nature of work, site name and risk involved etc. On verification of the details it is apparent that the appellant has done 8 project works During the appellate proceedings this assessment year. One of the project as verified was as per the agreement from Government of Andhra Pradesh for examining the project, the construction of Gandikota Dam across Pennaa River. This was awarded by Government of Andhra Pradesh Irrigation and CAD(PW) department and as per the agreement entered on 25.10.2004 the name of work is mentioned as

"investigation, preparation of Hydraulic particulars, designing and fabrication and irrigation of cross regulator and Head regulator and lift irrigation system, supply and fabrication of Hydro mechanical components and reaction of vertical gates, stop log gates and its accessories. For this project there is another section maintaining defect liability period terms and conditions as per which "the contractor shall take care of the maintenance for a period of 2 years or from the date of completion certificate of total work whichever is more, The contractor shall be responsible for the maintenance of all components of the project including associated works in accordance with production utility practice". Like that the appellant has furnished copy of the contract agreement maintenance etc. Therefore, as submitted by the appellant, it is observed that all these contract projects are infrastructural and not work contract. Therefore, since during this assessment year all the project/contract works done by the appellant were not work contract by following the appellant's own done by the appellant. Therefore, all these contract are eligible for 80IA deduction. Hence, the 80IA deduction claimed by the appellant of Rs. 11,86,68,902/- to be allowed as eligible deduction. Thereby the addition made by the AO deleted."

6.7 As the projects being carried out during the year under consideration are the same as were in A.Y. 2010-11, I have no reasons to deviate from the conclusions drawn by my colleague Commissioner of Income Tax (A) in the assessee's own case for Assessment Year 2010-11 that all these projects are infrastructural projects and not simple works contracts. Therefore, following same I held that all the projects being carried out by assessee are infrastructural projects and not work contracts and hence assessee is eligible for deduction under section 80IA on the profits from all the projects carried out by the assessee. Hence I direct the Assessing Officer to allow deduction under section 80IA as claimed by the assessee.

4. It was submitted that on the basis of the said paragraphs from the order of the learned CIT (A), that the learned CIT (A) relied upon the order of the Tribunal passed for the A.Y 2007-08. Thereafter, the learned DR drew the attention of the Bench to the order passed by the Tribunal in ITA No.1292/Hyd/2010 for the A.Y 2007-08 vide order dated 27.08.2012 which reads as under:

> *"23. In the case of GVPR Engineers Ltd. v. ACIT, 51 SOT 207 (Hyd) (URO) wherein the Tribunal held that deduction u/s. 80IA is available to developers who undertake entrepreneurial investment risk and not for the contractors, who undertake only business risk. Without any doubt, the assessee clearly demonstrated that the plant and machinery, technical know-how, expertise and financial resources.*

Therefore, if the contracts involve design, development, operation & maintenance, financial involvement and defect correction and liability period, then such contracts cannot be called as simple works contract, to deny the deduction under section 80IA. The contracts which contain above features to be segregated have to be granted deduction under section 80IA and the other agreements which are pure works contracts hit by the Explanation to section 80IA(13) are not entitled for deduction under section 80IA. The profit from the contracts which involve design, development, operating & maintenance, financial involvement and defect correction and liability period is to be computed by the Assessing Officer on pro rata basis of turnover. The Assessing Officer is directed to examine the records, accordingly, and grant deduction on eligible turnover.

24. In the case of KMC Construction Ltd. v. ACIT, 51 SOT 214 (Hyd) (URO) wherein the Tribunal has taken the same view.

25. In the case of Sushee Hi-Tech Constructions Pvt. Ltd. vs. DCIT, in ITA Nos. 269 & 1165/Hyd/2009 and ITA No. 1171/Hyd/2010 dated 16th March, 2012 wherein the Tribunal held as follows:

" ... The assessee should not be denied the deduction under section 80IA of the Act as the contracts involves, development, operating, maintenance, financial involvement, and defect correction and liability period, then such contracts cannot be called as simple works contract. In our opinion the contracts which contain above features to be segregated and on this deduction u/s. 80-IA has to be granted and the other agreements which are pure works contracts hit by the explanation section 80IA(13), those work are not entitle for deduction u/s 80IA of the Act. The profit from such contracts which involves development, operating, maintenance, financial involvement, and defect correction and liability period is to be computed by assessing officer on pro-rata basis of turnover. The assessing officer is directed to examine and grant deduction on eligible turnover as directed above."

26. In view of the above order of the Tribunal on similar issue relating to deduction u/s 80-IA(4), we are inclined to remit the issue back to the file of the Assessing Officer to decide the issue in the light of the above orders".

5. On the basis of the above said order of the Tribunal for the A.Y 2007-08, it was submitted that the Tribunal had merely remanded back the matter to the file of the Assessing Officer with the above said direction. It was submitted that the Assessing Officer was duty bound to examine the record and record a categorical finding on the various aspects mentioned in the order. It was submitted by the learned DR that since the order of the

learned CIT (A) was based on the direction of the Tribunal for the A.Y 2007-08 and in the said decision had directed the Assessing Officer to carry out the assessment and record a categorical finding on the aspect of design, development, operation maintenance and financial involvement and defect correction and liability period. Since nothing has been decided in the appeal of the assessee for the A.Y 2007-08 by the Tribunal, it was wrong on the part of the learned CIT (A) to rely upon the direction of the Tribunal for the A.Y 2007-08 while deciding the appeal of the assessee. Therefore, it was submitted the order passed by the learned CIT (A) is without any basis and therefore, the same is required to be quashed.

6. Per contra, the learned AR drew the attention of the Bench to the order of the Tribunal for the A.Y 2007-08 wherein this specific direction was issued by the Tribunal to the Assessing Officer to record a finding on the aspects of design, development, etc. (Para No.23 to 26), it was submitted that the Assessing Officer while passing the assessment order has not carried out and implemented the direction of the Tribunal in letter and spirit and instead has expanded the scope of its direction without any authorization or warrant from the Tribunal and decided the issue for the A.Ys 2007-08 onwards. He had drawn our attention to the Assessing Officer's order in appeal for 2007-08 wherein the Assessing Officer in Para 7 at Page 8 mentioned as under:

> *"7. Though not specifically warranted by the ITAT, examination of conditions laid down by section 80IA vis-à-vis assessee's context is also attempted to further provide elaboration on the issue, as under".*

7. We have heard the rival arguments made by both the sides and perused the material available on record. Undoubtedly the Tribunal for the A.Y 2007-08 has directed the Assessing Officer to carry out the proceedings and record a categorical finding about the entitlement of the assessee on certain parameters laid down in the order dated 12.08.2012. The order of the Assessing Officer for the A.Ys 2006-07 & 2007-08 and thereafter clearly shows that the above direction of the Tribunal has not been followed by the Assessing Officer in strict sense and no finding has been recorded by the Assessing Officer on the very aspect highlighted by the Tribunal. Since the direction of the Tribunal has not been implemented by the Assessing Officer for the A.Y 2006-07/ 2007-08 under consideration and further that the learned CIT (A) had wrongly relied upon the direction of the Tribunal for the A.Y 2006-07/2007-08 had recorded the finding in favour of the assessee, we find neither the Assessing Officer nor the learned CIT (A) understood the directions of the Tribunal in right earnest and both have wrongly decided the issue. In the light of the above, we deem it proper to restore the issue back to the file of the Assessing Officer with a direction to decide the issues in the light of the directions for the A.Y 2007-08 of the Tribunal and record a categorical finding about the entitlement of the assessee. Therefore, present appeal is remanded back to the file of the Assessing Officer with a direction to redo the entire exercise as indicated by the Tribunal for the A.Ys 2006-07 & 2007-08.

8. Since we have already remanded back the appeal for the ay 2011-12 to the file of the Assessing Officer, following similar reasonings, the remaining appeals of the assessee and revenue are also remanded back to the file of the Assessing Officer

to carry out the similar exercise for all the A.Ys falling in the present set of appeals.

9. In the result, appeals filed by the Revenue as well as the Assessee are allowed for statistical purposes.

Order pronounced in the Open Court on 30th May, 2023.

Sd/-	**Sd/-**
(R.K. PANDA) **ACCOUNTANT MEMBER**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 30th May, 2023.
Vinodan/sps

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3	Pr. CIT-6, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order