

IN THE INCOME TAX APPELLATE TRIBUNAL, KOLKATA BENCH 'SMC', KOLKATA

**BEFORE SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, HON'BLE ACCOUNTANT MEMBER**

**ITA No.181/Kol/2023
Assessment Year: 2016-17**

Simplex Krita JV		ITO, Ward-33(1), Kolkata
Simplex House, 27, Shakespeare Sarani, Kolkata-700017.	vs	
PAN: AALAS 5699 F		
(Appellant)		(Respondent)

Present for:

Appellant by : Shri S.K. Tulsiyan, Advocate
Respondent by : Smt. Ranu Biswas, Adtl. CIT, DR

Date of Hearing : 08.05.2023
Date of Pronouncement : 30.05.2023

ORDER

PER SONJOY SARMA, JM:

This appeal in ITA No. 181/Kol/2023 for A.Y. 2016-17 is preferred by the assessee against the order of the Commissioner of Income Tax, National Faceless Appeal Centre, Delhi (NFAC) [Ld. CIT in short], dated 25.01.2023. The assessee has raised the following grounds of appeal:

"1. That. on the facts and in the circumstances of the case, the Ld. CIT(A), NFAC, Delhi erred in law in sustaining the disallowance of the claim of admissible deduction of Rs.29,67,937/- u/s 80-1A(4) of the Act on the alleged ground that the appellant was merely a contractor and not a developer in spite of the fact that the appellant-JV was actually engaged in the business of development of infrastructural facility.

2. That. the Ld. C.I.T.(A) while upholding the disallowance of deduction of Rs.29,67,937/- claimed u/s 80-IA(4) of the Act erred in not considering that the appellant-JV pursuant to award of the project work by KMC engaged itself in the construction of the said project work which constituted infrastructure facility as defined in the Explanation to sec.80-IA(4) of the Act.

3. That, the Ld. C.IT.(A) further erred in upholding the disallowance of deduction of Rs.29,67,937/- u/s 80-IA(4) of the Act without considering that the activities of the appellant-JV were outside the purview of the Explanation below sec. 80-IA(13) of the Act and that the conditions for claiming deduction u/s 80-IA of the Act have been fully satisfied by the appellant-JV.

4. That, the denial of eligible deduction of Rs.29,67,937/- u/s 80-IA(4) of the Act by the Ld. revenue authorities was altogether erroneous, uncalled for and bad in law inasmuch as the Hon'ble jurisdictional Tribunal in various counter appeals on similar facts and nature of business activities has held that the assessee therein were not works contractor simplicitor and were developers and are eligible for deduction u/s 80-A of the Act.

5. That, therefore, as the order of the Ld. CIT(A), NFAC, Delhi upholding the assessment order on the above issues suffers from illegality and is devoid of any merit, the same should be quashed and your appellant be given such relief(s) as prayed for.

6. That, the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/or rescind any or all of the above grounds.”

2. Brief facts of the case are that the assessee is an AoP which is representing by its members M/s. Simplex Infrastructure Limited and M/s. Krita Engineering (P) Ltd. The assessee is engaged in the business of contractual work and claiming deduction u/s 80IA of the Act. The assessee was awarded contract for construction of Micro Tunnelling Works on Sewerage Pressure Main from Santoshpur Pumping Station to Garden Reach Sewage Treatment Plant and the assessee had claimed deduction u/s 80IA(4) of the Act of Rs. 29,67,937/-. However, such deduction claimed by the assessee was denied by the AO on the ground that it is not eligible for deduction u/s 80IA(4) of the Act.

3. Aggrieved by the above order, assessee preferred an appeal before the ld. CIT(A). At the time of hearing before the ld. CIT(A), assessee had submitted details of all the conditions laid down u/s 80IA(4) of the Act and accordingly assessee has claimed for deduction against the order passed by the ld. AO.

The assessee also submitted before the Id. CIT(A) that it was not acting as works contractor but actually the assessee involved in developing infrastructure project as envisaged under the provisions of section 80IA of the Act. However, according to Id. CIT(A) after considering the submission of the assessee, he sustained the addition made by the AO.

4. Aggrieved by the above order, assessee preferred an appeal before the Tribunal. At the time of hearing, Id. counsel has submitted a detailed paper book containing 82 pages and various details of the functions carried out by the assessee while adjudicating the project to substantiate his claim. The Id. counsel further brought to our notice to the fact that the co-ordinate bench of this Tribunal in the similar facts of the case has allowed deduction u/s 80IA(4) of the Act in the case of ITO, Ward-33(4) Kolkata Vs. M/s Somdatt Builders Simplex JV in ITA 470/Kol/2015 for the Assessment Year 2011-12 vide order dated 05.07.2017. The relevant operative portion of the said order is reproduced below:-

“8. Heard rival submissions and perused the material available on record. We find that the only question is to be decided by us for allowance of deduction u/s. 80IA of the Act as to whether the assessee is a developer or a works contractor. The AO found that the assessee claimed TDS credit of the amounts deducted by the project authority and thereby he held that the assessee is not a developer and is a works contractor. Now we may refer to the consolidated order dt:18-06-2013 of the Coordinate Bench in identical case supra, wherein it considered the order of ITAT Hyderabad in the case of M/s. GVPR Engineers Ltd Vs. ACIT. Relevant portion of which is reproduced herein below:-

“the co-ordinate bench ITAT, Hyderabad ‘B’ Bench, Hyderabad in the case of M/s. GVPR Engineers Ltd &Ors in ITA Nos. 347/Hyd/2008 & 17 Others dated 29.02.2012, wherein in paras 26-29, it has been held as under:-

26. We have considered the elaborate submissions made by both the parties and also perused the materials available on record. We have also gone through all the case laws cited by both the parties. We find that the provisions of Section 801A (4) of the Act when introduced afresh by the Finance Act, 1999, the provisions under section 801A (4A) of the Act were deleted from the Act. The deduction available for any enterprise earlier under section 801A (4A) are also made available under Section 801A (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 clear 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.

27. We also find that according to sub-clause (a), clause (i) of sub section (4) of 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.

28. The next question is to be answered is whether the assessee is a developer or mere works contractor. The Revenue relied on the amendments brought in by the Finance Act 2007 and 2009 to mention that the activity undertaken by the assessee is akin to works contract and he is not eligible for deduction under section 80IA (4) of the Act. Whether the assessee is a developer or works contractor is purely depends on the nature of the work undertaken by the assessee. Each of the work undertaken has to be analyzed and a conclusion has to be drawn about the nature of the work undertaken by the assessee. The agreement entered into with the Government or the

Government body may be a mere works contract or for development of infrastructure. It is to be seen from the agreements entered into by the assessee with the Government. We find that the Government handed over the possession of the premises of projects to the assessee for the development of infrastructure facility. It is the assessee's responsibility to do all acts till the possession of property is handed over to the Government. The first phase is to take over the existing premises of the projects and thereafter developing the same into infrastructure facility. Secondly, the assessee shall facilitate the people to use the available existing facility even while the process of development is in progress. Any loss to the public caused in the process would be the responsibility of the assessee. The assessee has to develop the infrastructure facility. In the process, all the works are to be executed by the assessee. It may be laying of a drainage system; may be construction of a project; provision of way for the cattle and bullock carts in the village; provision for traffic without any hindrance, the assessee's duty is to develop infrastructure whether it involves construction of a particular item as agreed to in the agreement or not. The agreement is not for a specific work, it is for development of facility as a whole. The assessee is not entrusted with any specific work to be done by the assessee. The material required is to be brought in by the assessee by sticking to the quality and quantity irrespective of the cost of such material. The Government does not provide any material to the assessee. It provides the works in packages and not as a works contract. The assessee utilizes its funds, its expertise, its employees and takes the responsibility of developing the infrastructure facility. The losses suffered either by the Govt. or the people in the process of such development would be that of the assessee. The assessee hands over the developed infrastructure facility to the Government on completion of the development. Thereafter, the assessee has to undertake maintenance of the said infrastructure for a period of 12 to 24 months. During this period, if any damages are occurred it shall be the responsibility of the assessee. Further, during this period, the entire infrastructure shall have to be maintained by the assessee alone without hindrance to the regular traffic. Therefore, it is clear that from an undeveloped area, infrastructure is developed and handed over to the Government and as explained by the CBDT vide its Circular dated 18-05-2010, such activity is eligible for deduction under section 801A (4) of the Act. This cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. Therefore, the assessee is a developer and not a works contractor as presumed by the Revenue. The circular issued by the Board, relied on by learned counsel for the assessee, clearly indicate that the assessee is eligible for deduction under section 801A (4) of the Act. The

department is not correct in holding that the assessee is a mere contractor of the work and not a developer.

29. We also find that as per the provisions of the section 80IA of the Act, a person being a company has to enter into an agreement with the Government or Government undertakings. Such an agreement is a contract and for the purpose of the agreement a person may be called as a contractor as he entered into a contract. But the word "contractor" is used .to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. The word "contractor" is used to denote the person who enters into such contract. Even a person who enters into a contract for development of infrastructure facility is a contractor. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor."

9. The Co-ordinate Bench of this Tribunal in identical case vide order dt.18-06-2013 supra, further considered the order in the case of ARSS Infrastructure Projects Ltd Vs. ACIT, Cir-2(1), Bhubaneswar in ITA Nos. 142,143/CTK/2010 & 483, 484/CTK/2011 dt. 13-06-2013 observed that where an assessee is doing contract work according to the requirement and specification of the customer and the same has been done by using materials purchased from third parties other than the customers and held that though the assessee is doing a works contract the same would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work' in section 194C of the Act. Relevant findings are reproduced herein below for better understanding:-

11. We have considered the rival submissions. Admittedly, a perusal of the agreement entered into between the assessee and the Govt of Andhra Pradesh Irrigation & CAD Department shows that the assessee has taken EPC/Turnkey contract of the flood flow canal project from SRSP. The name of the contract has been extracted earlier in this order. The scope of the work is also extracted above. Admittedly, the assessee has taken a turnkey contract from the Irrigation Department, Govt. of Andhra Pradesh. The turnkey contract is in respect of the irrigation project. Irrigation project is an infrastructure facility within the scope of Explanation to section 80IA(4) of the Act. The provisions of section 80IA(4) is to be controlled by the Explanation to section 80IA, which has been substituted by the Finance (No.2) Act, 2009 with retrospective effect from 1-4-2-2000. This

Explanation is found after sub-section (13) of section 80IA. The said Explanation attempts to control the provisions of sub-section 4. More so, it says that nothing contained in section 80IA would apply in relation to the business referred to sub-section (4), which is in the nature of works contract. A works contract is not defined in section 80IA. Now, what would come into consideration is whether the substituted Explanation after sub-clause (13) changed the nature of the meaning of 'infrastructure facility' provided in the Explanation to section 80IA(4). Admittedly, the Explanation to section 80IA(4) gives the meaning the term 'infrastructure facility'. The substituted explanation after sub clause (13) brings in the nature of work as a works contract. The provisions of section 194C, which deals with TDS in respect of payment to contractors for carrying out any work in the Explanation thereto as explained the term 'work' to be an inclusive definition, but has provided an exclusion to be 'does not include manufacturing or supplying of a product, according to requirement or specification of the customer by using materials purchased from a person, other than such customer'. Thus, with this in mind, a perusal of the turnkey contract agreement entered into by the assessee with the Irrigation Department, Govt. of A.P clearly shows that the construction of all the structures of the whole canal system is to be as per approved design, drawings, specifications of the department etc. The survey is to be done as per investigation and designing criteria of the Irrigation Department. This is also as per article 11.1 of the agreement. The assessee is to procure the materials independently and those materials are to conform to the specifications provided. The assessee is also to make its arrangements for storage of the materials. This is as per article 107 of the agreement. Thus, admittedly the work done by the assessee falls in the exclusion provided to the meaning of the work given in the Explanation to section 194C of the Act. Once it falls outside the meaning of term 'work' for the purpose of section 194C, the question that arises is can it be said that the assessee is doing the work contract as provided in the substituted Explanation in section 80IA after sub clause (13)?, The answer would be emphatic no.

12. This is because the assessee is doing the activity of development of an infrastructure facility as provided under section 80IA(4). The project is a Turnkey project and it cannot form nor have a character of a works contract. Works contract would be applicable to the repairs and maintenance of an existing project. Works contract cannot be in relation to the development of a new project. One of the arguments raised by the learned Sr. DR that the intention of the substitution of the Explanation after sub clause (13) of section 80IA was to deny, the benefit of deduction u/s.

80IA(4) in respect of works contract, but to provide the deduction to such undertakings, which is doing the business of building, operating and Transfer (BOT) and building owning, operating and transfer BOOT as also PPP contracts does not hold water in so far as an irrigation project can never function under BOT or BOOT or PPP. In the circumstances, we are of the view that the assessee's claim is not hit by the substituted Explanation as provided after sub clause(13) of section 80IA.. Here, we may mention that this view finds support from the decision of the coordinate of the tribunal, [ITAT, Hyderabad Bench, Hyderabad in the case of GVPR Engineers Ltd &Ors (refer to supra). We may mention here that our view also finds support from the decision of the co-ordinate bench of this tribunal, ITAT Cuttack Bench, Cuttack in the case of ARSS Infrastructure Projects Ltd Vs. ACIT, Circle-2 (1), Bhubaneswar in ITA Nos. 142, 143/CTK/2010 & 483,484/CTK/2011 dated 13-06-2013, wherein one of us was a party and in which case it has been held as under :-

10. Now coming to the merits of the deduction u/s. 801A(4) of the Act. A perusal of the provisions of section 801A(4) of the Act shows that in the explanation 'infrastructure facility' has been specified to mean a road including a toll road, a bridge or a rail system. Admittedly, the assessee is doing the business of development of railway tracks and bridges thereof as also roads. If, we are to accept the contention of the Ld. CIT that the provisions of section 801A(4) of the Act after the substitution of the explanation to section 80IA of the Act was introduced was only for the purpose of giving the benefit to BUT contracts then, the explanation to section 801A(4) of the Act becomes otiose. This is as explanation to section 801A(4) of the Act specifically provides for the road to include a toll road, a bridge or a rail system. BUT contract in respect of the railway system can never exist. Further, a perusal of the provisions of section 801A of the Act shows that the term 'works contract' is not defined in the said section. However, the terms 'works' and 'contract' is defined in the provisions of section 194C of the Act. If a particular word or term is not defined in the specific section then, one could go to other sections in the said Act where the definition would be available to draw a meaning to the said terms. In the provisions of section 194C of the Act, work has been given an inclusive definition but in the subsequent portion it has excluded the manufacturing or supplying a product according to requirement or specification of a customer by using material purchased from a person other than such customer. As has been specified by the Ld. AR, the assessee is doing contract work but that work is according to the requirement and specification of the customer and the same has been done by using materials purchase from third parties other than the customers. Thus,

though the assessee is doing a works contract the same would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work' in section 194C of the Act. The issue raised by the Ld. CIT that the assessee is not doing the development work but is only doing the contract also does not stand to test as the assessee admittedly is developing the roads and railway lines and the bridges thereof. Development encompasses within itself contract work. The agreement between the assessee and the customer being the government is for the development of the infrastructure facility being roads and rail systems and bridges by participating in the tenders. Under these circumstances, we are of the view that the AO was right in law in granting the assessee the benefit of deduction u/s. 801A(4) of the Act.

10. Further, this Tribunal in assessee's own case for A.Ys 2008-09, 2009-10, 2010- 11 and 2007-08 considered the orders of Hyderabad Tribunal and Cuttack Tribunal in the cases of GVPR Engineers Ltd and ARSS Infrastructure facility being roads and rail systems and bridges by participating in the tenders. Under these circumstances, we are of the view that the AO was right in law in granting the assessee the benefit of deduction u/s 80IA(4) of the Act.

5. We respectfully following the consistent view as laid down by the co-ordinate bench, we set aside the order passed by the ld. CIT(A) on this account and accordingly the ground taken by the assessee is allowed.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 30.05.2023

Sd/-

**(GIRISH AGRAWAL)
ACCOUNTANT MEMBER**

Sd/-

**(SONJOY SARMA)
JUDICIAL MEMBER**

Kolkata: 30.05.2023
Biswajit, Sr. P.S.

Copy to:

1. The Appellant: Simplex Krita JV.
2. The Respondent: ITO, Ward-33(1), Kolkata.
3. The CIT,
4. The CIT (A)
5. The DR .

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata