IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD 'A' BENCH, HYDERABAD.

BEFORE SHRI RAMA KANTA PANDA, VICE PRESIDENT
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA Nos.184 and 185/Hyd/2018		
Assessment Years: 2013-14 and 2014-15		
Dy. Commissioner of Income Tax, Central Circle – 2(1), Hyderabad.	Vs.	M/s. HES Infra Private Limited, 74-5-9/1, Prakash Nagar, Rajahmundry – 533106, Andhra Pradesh. PAN : AABCH8954L
(Appellant)		(Respondent)
Assessee by:	Sri A. Srinivas, C.A.	
Revenue by:	Ms. TH Vijaya Lakshmi, CIT-DR	
Date of hearing:	29.08.2023	
Date of pronouncement:	31.08.2023	

O R D E R

Per Shri Laliet Kumar, J.M.

These two appeals are filed by the Revenue, feeling aggrieved by the separate orders passed by the Commissioner of Income Tax (Appeals) – 12, Hyderabad dated 03.11.2017 invoking proceedings u/s 143(3) of the Income Tax Act, 1961 for the A.Ys 2013-14 and 2014-15, respectively.

2. The grounds raised by the Revenue in both the appeals are same and hence, we are reproducing the grounds of ITA No.184/Hyd/2018 only, for the sake of brevity and the same read as under :

" 1) Whether on the facts and circumstances of the case, and in law, the ld. CIT(A) erred in a holding that the provision of deduction u/s 801A(4) is applicable to constituent of the JV/Consortia without appreciating that the assessee has not entered into an agreement with the. Central Government or a State Government or a Local Authority or any other Statutory Body.

2) Whether on the facts and circumstances of the case, and in law, the id. CIT(A) erred in not appreciating that the assessee herein is not a developer but merely a contractor in respect of the project not directly awarded to it?

3) Whether on the facts and circumstances of the case, and in law, the id. CIT(A) erred in not appreciating that the facts of the case are not in conformity with clarificatory amendment to section 80IA of IT Act (Explanation 2 to. Section 80 IA vide Finance Act 2007) which was introduced to unambiguously explain that only those enterprises that have entered development agreement with Central or State or Local authorities and invest their own funds to develop such facilities will only be eligible for benefit of deduction."

2.1. As the facts and issues in both the appeals are same, except the amounts involved, we are reproducing the facts of appeal in ITA No.184/Hyd/2018 for the sake of brevity.

3. The brief facts of the case are that assessee company is in the business of undertaking contracts for Civil Works and infrastructure projects. The return of income was filed on 30-09-2013, admitting a total income of Rs.9,08,12,280/- arrived after claiming deduction for Rs.19,31,63,096/- u/s.80IA(4) of I.T.Act. While finalizing the assessment order, the AO partially disallowed the said deduction, to the extent of Rs.2,47,52,506/- on the premise that the assessee is not eligible for deduction u/s.80IA(4), on the profits derived from the projects/works executed as a of constituent of AOP/Joint Ventures. In the process, the AO did not consider the plea of the assessee to follow the decision of ITAT,

Visakhapatnam, in the case of India Vs ITO (in ITA No.540 of 2009), to the effect that a constituent is eligible for deduction u/s.80IA(4), on the ground that department has not accepted said decision. Thus, the Assessing Officer completed the assessment and passed order on 23.03.2016 u/s 143(3) of the Act.

4. Feeling aggrieved with the order of Assessing Officer, assessee carried the matter before the Ld.CIT(A) who allowed the appeal of assessee.

5. Aggrieved with the order of ld.CIT(A), Revenue is now in appeal before us.

6. Firstly, ld. DR had drawn our attention to Paragraphs 2.4 to 2.6 of the assessment order which is to the following effect :

> *"2.4 In the present case, it is seen that the assessee is a constituent of Joint Venture Company-HES-MEIL-ZVS but not a SPV specifically formed for this purpose and the works were carried out by the assessee in proportion to its share as per the Joint Venture Agreement. However, as per the provisions of Section 80-IA only the enterprise which enters into an agreement with the Government/Statutory body is eligible for deduction u/s 80-IA. In the instant case, the agreement was entered into by the Joint Venture, whereas the deduction u/s 80-1k was claimed by its constituent members, which is in contravention of the provisions of Section 80-IA.*
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> *2.5. Apart from the above, the decision of of Hon'ble ITAT in the case of M/s Transtroy India Limited wherein it was held that deduction u/s 80-IA is allowable to joint Ventures, was not accepted by the Revenue and further appeal has been filed before the Hon'ble High Court, against the order of the Hon'ble ITAT. Keeping this in view, in order to keep the issue alive, the claim of deduction U/s 801A on the project awarded to JVs is disallowed. However the demand arising due to such disallowance shall not be enforced, if the assessee files an appeal before the CIT(A).*

2.6. In the light of the above facts and circumstances of the case, the deduction claimed u/s 80-IA on the Sreenivasapuram Reservoir Project amounting to Rs.2,47,52,506/- is disallowed and added back to the total income of the assessee."

7. The ld. DR thereafter submitted that the ld.CIT(A) had granted relief to the assessee and in the above said purposes, she had drawn our attention to para 5.3 to 5.33 which is to the following effect :

"5.3 I have carefully perused the submissions of the appellant as well as the order of the Assessing Officer. As could be seen from the facts/information brought on record, the assessee company is engaged in infrastructural activity of various kind, as enumerated in this order and among the works the company was awarded, some are shown to be awarded directly as a main contractor/builder, while some were awarded to JVs/Consortia, but executed by assessee company as constituent of the said iv, in proportion to their share. On these lines, the assessee claimed deduction of Rs.19,31,63,096/- u/s.801A(4), stating to represent the profits from the eligible projects for the year under reference. The AO examined these projects as regard to their eligibility for deduction 801A(4), with reference to the conditions as stipulated in provisions of section 801A(4) and the observations of judicial decisions. Though satisfied with the eligibility of profits of 7 of such projects representing profits of Rs.19.31 crores for the year under reference, the 'AO restricted the benefit of deduction u/s.801A(4), to the profits related to direct projects. Thus, the AO disallowed the deduction claimed on profits of Rs.2,47,52,506/-, other ground that the said amounts represent the profits attributable to One project / work awarded to JVs, where The assessee company is only a constituent and the claim of deduction on such pr0f1ts is violation of provisions of 801A(4); as the contracts have been awarded by Govt./Statutory Authorities only to such Joint Ventures/ Consortia. In this regard, the AO disregarded the submissions of the assessee, that the profits so earned by assessee company through JVs/Consortia neither formed part of total income of JVs nor any deductions u/s 801A(4) were claimed by JVs, on such incomes. The reliance of the assessee on the decision of ITAT, Visakhapatnam in case of M/s.Transtroy India Ltd Vs ITO (supra),

as regard to allowance of deduction u/s.801A(4) on the profits of JVs and accessibility to tax," was not accepted by the Assessing Officer on the ground that the decision of Hon'ble ITAT was not accepted by the department.

5.3.1 The appellant's objection on this issue is that the AO has not disputed the eligibility of profits for deduction u/s.801A(4), as claimed by the assessee, and the issue on assessability of incomes of JV or its constituents, has already been settled, by Judicial decisions. The further objection of the appellant decision of the Assessing Officer for not allowing deduction u/s.80IA(4) on the ground of decision of ITAT not having been accepted by department, is that this is not any legal basis. It is also contended by the appellant that Assessing Officer did not distinguish or dispute the facts as upheld by ITAT, Visakhapatnam, which has been further supported by the decision of ITAT, Lucknow, in the case of PNC Constructions Co Pvt. Ltd Vs. DCIT (37 Taxmann.com 361), and further upheld by Allahabad High Court (55 Taxmann.com 21). It was also rightly contended by the assessee/appellant that AO preferred not to allow deduction merely because the order of ITAT, Vishakhapatnam Bench, was not accepted by the department, and a further appeal was preferred before High Court. As regard to the binding nature of decision of ITAT, the appellant filed comprehensive explanations before the AO. Appellant also filed its submission drawing attention of the AO that the decision of (TAT is binding on lower authorities as per judicial precedents laid down by Apex Court, various High Courts and Tribunals. It was pointed out that till an order of (TAT is stayed or reversed at appropriate judicial forum, the same is binding. It was further contended that while not disputing the submission on the issue of binding precedent of the order of the Tribunal as also the merits of appellant's claim as to its eligibility, the AO did not allow the deduction for the reason that an appeal has been preferred against the order of the ITAT. There is no further discussion on merit/eligibility. Turning to the facts of the present case, the AO, having examined the nature of income that are attributable to the projects awarded to JVs but executed by the assessee, as constituent, worked out the amount of profit attributable to such projects at Rs.2,47,52,506/-. Claim of deduction u/s.801A(4) to this extent was held to be not allowable as deduction in the hand bf the constituent, which is contrary to the decision given by Hon'ble ITAT, Vishakapatnam in the case of M/s.Transtroy India Ltd Vs ITO (supra). As per the said decision, the assessee, being the constituent of the JVs/Consortia, having executed the contracts, was clearly held to be justified in claiming the deduction u/s.801A(4). Thus, the facts of the present case, being akin to the facts of case in M/s.Transtroy India Ltd., the assessee is

considered eligible for deduction u/s.801A(4) on profits attributable to the projects executed as a constituent as well, which is to the tune of Rs.2.47 crores.

5.3.2 On the issue of binding nature of (TAT decision, the case laws in the following cases support the cause and stand of the assessee.

(i) Union of India Vs Kamalakshi Finance Corpn Ltd (AIR 1992 SCC 711):

where in the Hon'ble Apex Court held that

"the mere fact that the order of the appellate authority is not acceptable-to the department-in itself is an objectionable phrase-and is the subject matter of an appeal, can furnish no ground for not following it, unless it's operation has been suspended by ci competent court.'

(ii) CIT vs Raison Industries Ltd 1158 Taxman 160 (SC)J:

Where in the Hon'ble Apex Court held that

"when an order is passed by a higher Authority the lower Authority is bound thereby, keeping in view of the principles ofjudicial discipline"

This view was also eidorsed by the Hon'ble Apex Court in the case of Bhopal Sugar Industries Ltd Vs ITO (AIR 1961 SC 18).

(iii) Aggarwal Warehousing & Leasing Ltd Vs CIT (257 ITR 235 (MP)

Where in the Hon'ble High Court has held that

"needless, to say, that the orders passed by the Tribunal are binding an all the revenue Authorities functioning under the jurisdiction of the Tribunal.

All the above decisions unanimously hold the view that orders of ITAT are binding on the Revenue Authorities under its jurisdiction and in this case, the decision of the ITAT, Vishakapatnam, is held to be binding on the AO under reference, unless the said order is stayed or suspended by a Superior Court or a different view is taken by the another Tribunal in the said jurisdiction. In this case, it was not the case of the AO to show that the decision of ITAT, Vishkapatnam, in the case of Transtroy (India) Ltd.(supra), as relied by the assessed, is not binding on him. Apart from relying on the order pf I1AT, Visakhapatnam in case of Transtroy (India) Ltd, (supra), whose decision is very much binding on the AO, the assesee made citation of the decision of ITAT, Agra, in the case of

PNC Constructions Co Ltd Vs DCIT reported in 144 ITD 577, where the assessee was constituent in JV with M/s NCC and project agreements were between the State Government and JV/Consortia, the deduction claimed by assessee as constituent of JV/Consortia, was held to be allowable.

The appellant also referred to the decision of Jurisdictional Tribunal in the case of Hindustan Ratna JV Vs. ITO, Ward-6(2), Hyderabad ITA No.372/HYD/2013, AY 2009-10, dated 18-12-2013, wherein it was held as under:

"In other words, we can safely conclude that there is no sub-contract between iv and the constituents and since the iv has been formed only to procure contract works from the Government and the contract is being executed by the constituent partners in their sharing ratio 60:40 as per the terms of iv, it cannot be said that the iv is a contractor and its constituents are sub-contractors."

5.3.3 Thus, based on the ratio of the judicial decisions cited, it is reasonable to hold that the AO is not justified in denying the deduction u/s.801A(4) on the profits of JVs to the assessee, as a constituent of the said JVs, disregarding the decision of [TAT, Vishakapatnam, which was not stayed in its operation and as such is binding on the AO. It is not correct on the part of the AO to not implement the said order, merely on the ground that such decision was not accepted by department. Further, the order of Allahabad High Court upheld the allowance of claim of deduction u/s.80IA(4), on the profits from the Joint Ventures, in the hands of the constituents. Thus, on similarity of facts, the AO is directed to allow the total amount of Rs.19,31,63,096/-, claimed as deduction u/s.80IA(4), for the year including the deduction of Rs.2,47,52,506/-, claimed on profits of JVs, as a constituent, as claimed in return of income. Accordingly, this ground of appeal is treated as ALLOWED.

6.0 In the result, the appeal of the appellant for the AY 2013-14 is ALLOWED."

8. Ld. DR further submitted that as per section 80IA(4) of the Act, the assessee is not entitled to claim deduction as contract has not been awarded to the assessee by the central government as mentioned by the Assessing Officer in the assessment order reproduced hereinabove.

9. It was submitted by the ld. DR that as the contract has not been awarded by the central government to the assessee therefore one of the conditions for claiming deduction as provided under section 80IA(4) has not been fulfilled by assessee, therefore, the assessee is not entitled to claim the said deduction. It was further submitted that the order passed by the ld.CIT(A) is not in accordance with the law.

10. Per contra, ld. AR for the assessee has drawn our attention to the order of the ld.CIT(A) reproduced hereinabove and it was submitted that the Tribunal in the case of M/s.Transtroy (India) Ltd. Vs. ITO in ITA No.540/2009 has decided the issue in favour of the assessee.

11. Further, it was submitted that the co-ordinate Bench of the Tribunal in the case of DCIT Vs. M/s. KNR Constructions Limited in ITA Nos. 190 & 191/Hyd/2018, relying upon M/s. Transtroy (India) Ltd (supra) had also granted similar relief to the assessee. The relevant portion of the said order reads as under :

> *5. We have given our thoughtful consideration to rival pleadings. Coming to Revenue's first and foremost argument regarding consortiums' and JVs entitlement to claim 80IA deduction relief, we make it clear that the tribunal's co-ordinate bench order in M/s. Transtroy India Limited(supra) has already decided the same issue in assessee's favour and against the department. No contrary judicial precedent has been quoted at the Revenue's behest to rebut the same. We thus, uphold the CIT(Appeals) findings qua this former grievance canvassed from the revenue's side.*
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> *6. Next comes equally important aspect of assessee's status as a developer or a mere works contractor u/s. 80IA(4) and 80IA Explanation; respectively. We note that the Assessing Officer*

detailed discussion in page No.9 of the assessment order has made it clear that the assessee itself satisfies all the three components of development, operation, and maintenance thereof along with financial involvement and risk factor involved in the corresponding infrastructure projects. The Revenue's argument raised before us goes contrary to the assessment findings therefore. We thus are of the opinion that there is neither any irregularity nor illegality in the order of the CIT(Appeals)'s identical findings allowing the assessee's sec.80-IA deduction claim. Both these lower appellate orders are upheld therefore.

12. It was submitted that the Tribunal is bound by the decision of the co-ordinate bench of the Tribunal and therefore, the relief should be granted to the assessee. In the alternative, it was also submitted by the ld. AR that the appeal of the Revenue is academic in nature as there is no tax effect even if the relief is granted by the ld.CIT(A) is withdrawn. For the above said purposes, he has drawn our attention to paras 10 and 11 of the assessment order wherein the computation of income under the MAT provisions were mentioned as Rs.6,54,87,384/-. Whereas as per normal computation under normal provisions, the total tax demand was Rs.3,76,84,796/-. On the basis of the above, it was submitted that the appeal of the Revenue is academic in nature and no tax liability can be fasten only even the issue is decided against the assessee.

13. We have heard the rival submissions and perused the material on record.

Section 80IA(4) provides as under :

(4) This section applies to—

(i) 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 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;

(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 (iii) 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:

14. From the perusal of section 80IA(4) of the Act, it is abundantly clear that for the purpose of claiming deduction, it is essential for the assessee to prove that the agreement has been entered by the assessee with the government / statutory body. Admittedly, in the present case, the agreement was not entered between the assessee with the government body and the agreement was entered into by the Joint Venture company namely, HES-MEIL-ZVS, whereas the deduction was claimed by assessee which happens to be one of its constituent member. In our view, the statue is unambiguous and clear which only provides that the enterprise in whose favour the work has been allotted or agreement has been entered shall alone be entitled to claim deduction under section 80IA(4) of the Act.

15. Therefore, in our view, the contention raised by the ld. DR for the Revenue is in accordance with the law and therefore, this legal issue is required to be decided in favour of the Revenue. However, the co-ordinate Bench of the Tribunal in the case of M/s.

KNR Constructions (supra) has decided the issue in favour of the assessee. In our view, the above said proposition cannot be said to be binding on this Bench in view of the fact that in later decision of the Hon'ble Supreme Court in the case Commissioner of Customs (Import) Vs. M/s. Dilip Kumar and Company, the issue has been decided by the Hon'ble Supreme Court in Paras 40 to 42 which read as under :

> *"40. After considering the various authorities, some of which are adverted to above, we are compelled to observe how true it is to say that there exists unsatisfactory state of law in relation to interpretation of exemption clauses. Various Benches which decided the question of interpretation of taxing statute on one hand and exemption notification on the other, have broadly assumed (we are justified to say this) that the position is well settled in the interpretation of a taxing statute: It is the law that any ambiguity in a taxing statute should ensure to the benefit of the subject/assessee, but any ambiguity in the exemption clause of exemption notification must be conferred in favour of revenue – and such exemption should be allowed to be availed only to those subjects/assesses who demonstrate that a case for exemption squarely falls within the parameters enumerated in the notification and that the claimants satisfy all the conditions precedent for availing exemption. Presumably for this reason the Bench which decided Surendra Cotton Oil Mills Case (supra) observed that there exists unsatisfactory state of law and the Bench which referred the matter initially, seriously doubted the conclusion in Sun Export Case (supra) that the ambiguity in an exemption notification should be interpreted in favour of the assessee.*
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> *41. After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statue including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.*

> *42. In Govind Saran Ganga Saran v. Commissioner of Sales Tax, 1985 Supp (SCC) 205, this Court pointed out three components of a taxing statute, namely subject of the tax; person liable to pay tax; and the rate at which the tax is to be levied. If there is any ambiguity in understanding any of the components, no tax can be levied till the ambiguity or defect is removed by the legislature [See Mathuram Agrawal v. State of Madhya Pradesh, (1999) 8 SCC 667; Indian Banks' Association vs. Devkala Consultancy Service, (2004) 4 JT 587 = AIR 2004 SC 2615; and Consumer Online Foundation vs. Union of India, (2011) 5 SCC 360.]"*

16. From the reading of the above, it is clear that in case a person seeking the deduction under the provisions of the Act, then onus is on the assessee to prove strictly that assessee fulfills all the parameters laid down by the statute for claiming the deduction. In the present case, admittedly, the agreement was not entered between the assessee and the Government / Statutory Government and there was a violation laid down by the statute and therefore, the assessee is not entitled to claim deduction. In light of the above, with respect to the binding nature of the co-ordinate Bench of the Tribunal, it will be suffice to say that the co-ordinate Bench of the Tribunal has not had the benefit of applying the decision of the Hon'ble Supreme Court in case of Dilipsingh (supra), which was later on followed in many cases. Therefore, the decision of the co-ordinate Bench of the Tribunal in the case of M/s. KNR Constructions Limited (supra) is not binding on this Bench. Therefore, the grounds raised by the Revenue are required to be allowed.

17. In the result, the appeal of the Revenue is allowed.

18. Now coming to the remaining appeal i.e. ITA No.185/Hyd/2018, which is identical to the facts and issues raised in ITA 184/Hyd/2018, our decision in ITA No.184/Hyd/2018 would apply mutatis mutandis. Accordingly, this appeal is allowed.

19. In the result, both the appeals of Revenue are allowed. The copy of the same may be placed in all respective case files.

Order pronounced in the Open Court on 31st August, 2023.

Sd/-	**Sd/-**
(RAMA KANTA PANDA) **ACCOUNTANT MEMBER**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 31st August, 2023.
TYNM / SPS

Copy to:

S.No	Addresses
1	Deputy Commissioner of Income Tax, Central Circle – 2(1), Hyderabad.
2	M/s. HES Infra Private Limited, 74-5-9/1, Prakash Nagar, Rajahmundry – 533106, Andhra Pradesh.
3	Pr.CIT(Central), Hyderabad.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order