

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI VIKAS AWASTHY, JM
AND
SHRI PRASHANT MAHARISHI, AM

ITA No. 1401/Mum/2023

(Assessment Year: 2018-19)

ITD Cementation India Ltd.
9th Floor, Prima Bay,
Tower-B, Gate No.5,
Saki Vihar Road, Powai,
Mumbai-400 072

(Appellant)

PAN No. AA ACT1426A

Vs.

DCIT
Central Circle 5(1)
Room No.1928, 19th Floor,
Air India Building,
Nariman Point,
Mumbai-400 021

(Respondent)

Assessee by

: Shri Vijay Mehta, AR

Revenue by

: Shri Ramkrishna Bandi, CIT DR

Date of hearing:

18.12.2023

Date of pronouncement :

22.02.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA No. 1401/Mum/2023, is filed by ITD Cementation India Ltd., (Assessee / Appellant) against the appellate order passed by The Commissioner of Income-tax (Appeals)-53, Mumbai, [the learned CIT (A)] for A.Y. 2018-19 dated 2nd March, 2023, wherein the appeal filed by the assessee against the assessment order passed by the National e-assessment Centre [the Ld AO] dated 23rd April, 2021, under Section 143(3) read with section 144B of the Income-tax Act, 1961 (the Act), was partly allowed. Therefore, the assessee is aggrieved and is in appeal before us.



02. The assessee has raised following grounds of appeal:-

"1. The Hon'ble Commissioner of Income tax (Appeals) -53 ['Hon'ble CIT(A)-53'] has erred in upholding the disallowance made by the Learned Assessing Office ['Ld. AO'] of the deduction claimed under Section 80-IA of the Act amounting to Rs. 2,75,52,02,630 in respect of the contracts entered with non- government entities without appreciating the fact that the said contract is originally awarded by the government to these parties.

2. The Hon'ble CIT(A)-53 has erred in partly upholding the disallowance made by the Ld. AO of the deduction claimed under Section 80-1A of the Act amounting to Rs. 2,83,68,967 in respect of the contracts awarded by Government or local or statutory authorities for developing and/or operating and/or maintaining a new infrastructure facility.

3. The Hon'ble CIT(A)-53 has erred in confirming the action of the Ld. AO in disallowing Rs. 1,97,740 under Section 36(1)(va) of the Act in respect of delay in depositing contribution received from employees to the employee's contribution fund after the due date under respective Act but before due date of filing return of income.

4. The Hon'ble CIT(A)-53 has erred in confirming the action of the Ld. AO in not restricting the levy of the dividend distributed tax on the dividend distributed/paid to the Appellant's holding company to 15% in terms of Article 10-Dividends of the Double



Taxation Avoidance Agreement (DTAA) between India and Thailand instead of 20.360% levied in terms of Section 115-0 of the Act."

03. Ground no.1 and 2 were modified by the assessee, which we deal with later on.
04. Brief fact of the case shows that assessee is a company engaged in the business of civil construction, mining and specialized engineering in construction activities. It undertakes construction of dams, bridges, port, airport and heavy constructions. The assessee obtains contracts including Government contract through tenders and further carries out projects throughout India.
05. Assessee filed its return of income on 4th December 2018 at ₹ nil, as per normal provision of the Act and book profit under Section 115JB of the Act was computed at ₹113,18,95,000/-. The return of income was picked up for scrutiny. Assessee has claimed deduction under Section 80 IA of the Act of Rs 28892 lakhs. .
06. The learned Assessing Officer, on scrutiny, passed assessment order on 23rd April, 2021, wherein
 - i. Disallowance under Section 14A of the Act was made of ₹57,490/- under normal computation and it was also added to the book profit u/s 115 JB of the Act.
 - ii. The assessee claimed deduction under Section 80IA of the Act of ₹28,982 lacs in respect of 16

different projects. The learned Assessing Officer noted that the deduction could be allowed if the assessee has entered into an agreement with the Central Government or State Government etc. The learned Assessing Officer was of the view that if the work is awarded by the private parties the deduction is not allowable. On examination, the learned Assessing Officer found that the assessee's job is restricted to complete the several contracts and he noted that assessee is a mere works contractor. Accordingly, he found that assessee is not satisfying the conditions prescribed under Section 80IA (4) of the Act and therefore, deduction of ₹28,982,91,000/- claimed by the assessee in respect of non-government entities is not allowed.

- iii. During the course of assessment proceedings, the assessee also claimed dividend distribution tax of ₹24,89,192/-, which was disallowed as assessee did not claim the same in the return of income or by revised return relying on the decision of the Hon'ble Supreme Court in case of Goetze (India) Ltd. Vs CIT (2006) 284 ITR 323 (SC).
- iv. disallowance under Section 36(1)(va) of the Act of ₹1,97,740/- was made as employees'



contribution was paid beyond due dates prescribed by respective acts

07. Aggrieved by the assessment order, the appeal was filed before the learned CIT (A), who passed an order on 2nd March, 2023,

- i. Regarding disallowance under Section 14A of the Act of ₹57,490/- in the normal computation of income as well as in the book profit, was deleted.
- ii. With respect to the deduction under Section 80IA of the Act, the learned CIT (A) noted that he asked the assessee to submit the facts of the claim completely with respect to the scope of work, work done and whether the assessee is merely a sub-contractor or developer. The assessee did not furnish the complete details before the learned Assessing Officer on examination of certain documents; he found that assessee is not a developer but a contractor. He also noted that the assessee has got the contract from private company who in turn were awarded contract by the Government and as the assessee has not a developer in accordance with the contracts government authorities, he agreed with the learned Assessing Officer and confirmed the disallowance. He also examined various projects and found that such contracts were awarded by private parties. He also examined that whether the assessee is operating or maintaining any infrastructure facilities or not with respect to certain contracts. He found that assessee is

entitled for deduction for part of the contracts. Accordingly, he allowed deduction partly. Accordingly, out of the total disallowance of deduction of ₹28,982 lacs, he allowed the deduction of ₹11,47,19,144/- and confirmed the balance disallowance of ₹278,35,71,856/-.

- iii. With respect to the claim of deduction of dividend distribution tax of ₹24,89,192/-, assessee submitted that as per Article 10 of India-Thailand treaty, the rate of tax on dividend is 10% and therefore, the claim of the dividend distribution tax should be accordingly allowed. The learned CIT (A) rejected the claim holding that dividend distribution tax is payable by the company and not by the shareholders and further the provision of Double Taxation Avoidance Agreement does not apply.
- iv. The assessee also raised ground regarding disallowance under Section 36(I)(va) of the Act of ₹1,97,740/-, which was rectified by the learned Assessing Officer vide order dated 3rd June, 2021, was also disallowed relying on the decision of the Hon'ble Supreme Court in case of Checkmate Services (P.) Ltd. vs. CIT [2022] 143 taxmann.com 178 (SC) [12-10-2022].

Accordingly, the appeal of the assessee was partly allowed.

08. Before us, contesting the claim of disallowance under Section 80IA of the Act, assessee raised ground no.1 and 2 Which are modified grounds of appeal as under:-

"1. The CIT(A) has erred in upholding the disallowance of the deduction claimed u/s. 80-IA of the Act amounting to Rs. 2,67,10,44,317 in respect of following contracts wherein agreement for developing infrastructure facility entered into with non-government entities without appreciating the fact that the said contract for developing infrastructure facility was originally awarded by the Government to these parties.

Sr. No.	Project No.	Name of the client	Amount (Rs.)
1.	35515DM	Bharat Mumbai Container Terminal Pvt. Ltd	2,48,43,68,393
2.	33714DM	Nhava Sheva India Gateway Terminal Pvt. Ltd.	15,44,06,108
3.	38115DM	Nhava Sheva India Gateway Terminal Pvt. Ltd.	2,45,98,466
4.	32214AX	Madhucon Project Ltd.	47,48,052
5.	36515AX	Oriental Structural Engineers Pvt. Ltd.	29,23,298
		Total	2,67,10,44,317

2. The CIT(A) has erred in partly upholding the disallowance made by the AO of the deduction claimed under Section 80-IA of the Act amounting to Rs. 2,83,68,967 in respect of the contracts awarded by following Government or local or statutory authorities for developing and / or operating and / or maintaining a new infrastructure facility.

Sr. No.	Project No.	Name of the client	Amount (Rs.)
1.	35314AX	Kolkata North Division	1,11,37,820
2.	41616AX	Ircon International Ltd	59,04,074



3.	41916BS	Agartala Municipal Corporation Sardar Agartala	82,08,585
4.	41516BA	Airport Director, Airport Authority of India	31,18,488

”

09. On this ground, assessee also made a prayer for admission of the additional evidence under Rule 29 of the ITAT Rules. In the application, assessee submitted that assessee has claimed deduction of ₹28,982/- lacs in respect of 16 projects on account of contracts entered with Government and non-Government parties. The learned Assessing Officer has disallowed the entire deduction claimed. The learned CIT (A) has deleted the disallowance to the extent of ₹11,47,19,144/- in respect of contract entered into with certain government entities. It was further stated that the partial disallowance confirmed by the learned CIT (A) is with respect to certain non-government contracts on the ground that assessee has failed to provide a documentary evidences. Now it is the claim of the assessee that contracts entered into with non-Government entities are originally awarded to them by the Government. It was also pointed out that on 26th October, 2021, there was a survey on the premises of the assessee resulting into several reassessments and ongoing transfer pricing proceedings with which assessee was fully occupied. The assessee has given brief of several notices issued in such proceedings. It was stated that during this period Id CIT (A) has called for several details vide order sheet entry dated 10th January 2023, which was submitted by the assessee on 15th February 2023, along with several

agreements on sample basis showing scope of work. As the contract copies were lying in godown, those could not be retrieved in time and therefore, those could not be submitted before the learned CIT (A). Subsequently, the assessee was able to procure those contracts and now produced before us as additional evidences. The assessee submitted three paper books containing page no.41 to 1488 of such additional evidences and requested for admission of the same. Certain judicial precedents were also relied upon.

010. The learned Authorized Representative also referred to paragraph no.7.3.1 of the order of the learned CIT (A), wherein non-submission of such detail was mentioned. He submitted that because of this reason also amongst others the deduction was denied. He submits that though the scope of work of various contracts were made available to the learned CIT (A), but in absence of these contracts, as assessee has failed to produce , deduction under Section 80IA of the Act is denied . His argument is that assessee was prevented because of sufficient cause for not producing these details and therefore, it should be admitted.

011. The learned Departmental Representative vehemently contested that these additional evidences should not be admitted at this stage and even otherwise these additional evidences are irrelevant for the reason that :-



- i. As assessee has failed to submit the same before the learned Assessing Officer and before the learned CIT (A), despite adequate opportunities provided
- ii. These additional evidences are not relevant at all to decide the issue as assessee is merely a subcontractor
- iii. This is not the reason for which deduction u/s 80 IA is denied.
- iv. Assessee is merely a works contractor and has not entered any contract with government, which are placed in additional evidences, which is main condition of 80 IA.

012. We have carefully considered the contentions mentioned in application under Rule 29 of ITAT Rules, 1963. It is apparent that in paragraph no.7.3, the learned CIT (A) specifically asked the assessee to produce the contract copies to ascertain whether the claim of the assessee falls within the parameter laid down under Section 80IA of the Act or not. Undoubtedly, assessee failed to produce the same before the lower authorities. Before us, it is submitted that assessee has submitted the scope of the work of the various contracts but could not submit the contract copies. It is stated that a survey took place on 26th October, 2021 and the case of the assessee were reopened for various assessment years and further transfer pricing proceedings of 7 years were going on. It is also the claim of the assessee that the contracts were



placed in the godown and its retrieval was taking long time. It is also the fact that assessee has submitted sample copies of some of the contract showing the scope of work. The learned CIT (A) has rejected the claim of the assessee for this reason also. This is evident as per paragraph no.7.3 of the order. In paragraph no.7.3.5, he mentioned that assessee did not file the full particulars of the contracts before the learned Assessing Officer also. In view of the above facts it is evident that complete details were not filed before the lower authorities.

013. According to Rule 29 of ITAT Rules, the parties to the appeal are not entitled to produce additional evidences either orally or in documents. However, the Tribunal can allow the parties to do so for any other substantial cause or the revenue authorities having provided inadequate opportunity to the assessee. In this case, we find that sufficient opportunities were provided to the assessee. But in this case, the disallowance of deduction claimed by the assessee is also confirmed for one of the reason of non-production of the evidences which assessee was prevented because of its non-availability or delay in its retrieval coupled with ongoing several reassessment and transfer pricing assessments pursuant to survey. Therefore, for these reasons, we allow the additional evidences to be adduced by the assessee.
014. It is also the argument of the learned Departmental Representative that whether the additional evidences submitted by the assessee are relevant to decide the issue



or not should be examined, as the assessee has not been awarded the contracts by the Government Authorities but is merely a contractor. It is also pressed by the learned Authorized Representative that the argument of the learned Departmental Representative is not sustainable for the reason that judicial precedents provide that direct agreement with the Government Authorities is not necessary.

015. As we have admitted the additional evidences, without going into the merits of the additional evidences, we restore the issue before the learned CIT (A) to examine these evidences and decide the issue of allowability of claim of deduction under Section 80IA of the Act with respect to the additional evidences. This is also so for the reason that the disallowance is confirmed for one of the reasons being non-production of the contracts. The learned CIT (A) may examine additional evidences, look at their relevance in claim of deduction of the assessee and decide the issue whether the assessee fulfils conditions under Section 80IA (4) of the Act or not. Accordingly, the ground no.1 and 2 to the extent indicated above are allowed.

016. Ground no.3 is with respect to the disallowance of ₹1,97,740/- under Section 36(1)(va) of the Act in respect of delay in depositing employee's contribution beyond the due dates prescribed under the respective Act. This ground is already decided by the learned CIT (A) against the assessee relying on the decision of the Hon'ble



Supreme Court. In absence of any argument by the learned Authorized Representative, same is dismissed.

017. Ground no.4 is with respect to the dividend distribution tax paid by the company at the rate of 20.36% under Section 115O of the Act, claim assessee that it should have been levied at the rate of 15% in terms of Article 10 of Double Taxation Avoidance Agreement between India and Thailand. As The learned Authorized Representative fairly admitted that this issue is decided against the assessee by the Special Bench in case of Total Oil Limited where it is held that dividend distribution tax is an additional tax charged on the distributed profits of the company and not on the shareholder. The learned Departmental Representative also agreed with the same.
018. We are of the view that decision of Total oil Limited [SB] has held that shareholders have nothing to do with the levy of DDT on distributed profits of the company. List of shareholders, their beneficial interest in the dividend and residential status of the shareholder as per DTAA are not produced before us. It has also not been established before us that even otherwise the claim is in time or not and further whether the sources country [India] has to cede its right of taxation or not. Therefore, all these issues remain unexamined at all stages.
019. In view of the decision of the Special Bench in ITA No.6997/Mum/2019, ground no.4 of the appeal is dismissed.



020. In the result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 22.02.2024.

Sd/-
(VIKAS AWASTHY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 22.02.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai