

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, AHMEDABAD**

**BEFORE SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER &
SHRI MAKARAND VASANT MAHADEOKAR, ACCOUNTANT MEMBER**

I.T.A. No.2025/Ahd/2018
(Assessment Year: 2014-15)

Deputy Commissioner of Income Tax, Circle-2(1)(2), Ahmedabad	Vs.	Kota Baran Tollway Pvt. Ltd., 222, Advait Complex, Nr. Sandesh Press Road, Vastrapur, Ahmedabad
[PAN No.AAECK2595B]		
(Appellant)	..	(Respondent)

Appellant by :	Shri Sudhendu Das, CIT-DR
Respondent by:	Shri Jaimin Shah, A.R.
Date of Hearing	25.04.2024
Date of Pronouncement	30.04.2024

ORDER

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

This appeal has been filed by the Revenue against the order passed by the Ld. Commissioner of Income Tax (Appeals)-2, (in short “Ld. CIT(A)”), Ahmedabad vide order 19.01.2018 passed for A.Y. 2014-15.

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

“1. The Ld CIT(A) has erred in law and on facts in allowing the deduction u/s 80IA(4) since the assessee is neither a developer nor is operating and maintaining any infrastructural facility which is the eligibility condition for availing the deduction u/s 80IA(4) of the Act.

1.1 The Ld CIT(A) has erred in law and on facts by allowing the said deduction to the assessee on his own without seeking a remand report from the AO regarding the exact nature of the work being carried out as this fact was never examined by the AO in assessment proceedings since the assessee had not claimed any such deduction in the ROI.

1.2 Without prejudice to the above, even if it was held that the assessee was engaged in the business of developing or operating and maintaining infrastructural

facility, still it was carrying out such business as work contractor; thus it was hit by the Explanation appended to the said section.

2. *It is humbly prayed to set aside the order of the Ld CIT(A) and direct the AO to re-examine the issue.*

3. *The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary.”*

Application for Condonation of Delay:

3. At the outset, we observe that the appeal of the Department is time barred by 164 days. The Department filed application for condonation of delay in which it was submitted that since the concerned officer was tied up with other administrative work, he advertently missed the contents of the present file and it was only at a later stage, when the concerned officers while cleaning up his desk / Almirah that the present file was recovered and delay in filing of the present appeal came within the knowledge of the concerned officer. It was submitted before us that the delay in filing of the present was due to bona fide reasons and hence same kindly be condoned.

4. In response, Ld. Counsel for the assessee also did not object to the delay in filing of the present appeal.

5. Accordingly, looking into the reasons cited for delay in filing the present appeal, in the interest of justice, the delay in filing of the present appeal is hereby being condoned.

On Merits:

6. The brief facts of the case are that the assessee is engaged in business of building infrastructure facilities and earning income by way of collecting toll from vehicles running on roads constructed by the assessee.

7. During the course of assessment, the Assessing Officer observed that assessee has claimed certain project facility expenses to the tune of Rs. 5,90,92,431/- as revenue expenses. The Assessing Officer was of the view that the aforesaid project facility expenses claimed by the assessee as revenue expenses are not a revenue expenditure, but a capital expenditure. Therefore, the same cannot be allowed as revenue / business expenditure. Accordingly, the Assessing Officer disallowed the above expenditure incurred by the assessee towards project facility expenses amounting to Rs. 5,90,92,431/- and added the same to the income of the assessee.

8. In appeal, Ld. CIT(A) observed that the assessee company is engaged in the business of operation and maintenance services on Operate Maintain and Transfer (in short “OMT”) basis on Kota Baran National Highway 76. The assessee submitted that the assessee has incurred expenditure on creation of certain facilities on toll plaza like toll plaza booth, canopy, medical aid post, sign board, plantation, toll automation, lighting etc. which are termed as project facility expenses. The assessee argued that the aforesaid expense do not create any capital right or assets in the case of the assessee company on which the assessee is eligible for claim of depreciation. Further, it was submitted that in the case of group concern of the assessee, Chittorgarh Kota Baran Pvt. Ltd., Ahmedabad, similar expenditure has been allowed as revenue expenditure. The assessee further submitted that the assessee company is also eligible for claiming for deduction under Section 80IA(4) of the Act and relied on Gujarat High Court decision in the case of **ITO vs. Keval Construction 33 taxmann.com 277 (Gujarat)**, wherein it was held that in disallowance of expenditure would increase profit derived from industrial undertaking and such disallowances will only enhance the quantum of deduction under Section 80IA

of the Act. The assessee submitted that it is operating on an OMT model basis (operate maintenance and transfer model) and under the concessionaire agreement, the expenditure falls under the “major maintenance work” and therefore, should be allowed as a revenue expenditure. The Ld. CIT(A) observed that though the assessee is eligible for claim of deduction under Section 80-IA of the Act, in the return of income the assessee did not claim deduction under Section 80-IA of the Act since the assessee had incurred losses while filing return of income. Accordingly, while the Ld. CIT(A) upheld the additions made by the Assessing Officer, he further held that the assessee is eligible for claim of deduction under Section 80-IA(4) of the Act and accordingly, directed the Assessing Officer to grant deduction to the assessee, after carrying out due verification. The Ld. CIT(A) while allowing the appeal of the assessee made the following observations:-

“2.11. Appellant company is engaged in infrastructure facility in the form of operate and maintain toll road which is covered u/s. 80IA(4)(i) of the Act. The appellant has been granted the work of operation and maintenance of toll vide letter of award NHAI/OMT/RFP/8/2009-10/554 dated 01/11/2010. Appellant has filed return of income on 29/11/2014 within the prescribed time limit. In view of the above, appellant is eligible for deduction u/s. 80IA(4) of the Act. The CBDT vide Circular No. 37 of 2016 dated 02/11/2016 has settled the position that the disallowances made u/s, 32, 40(a)(ia), 40A(3), 43B etc. of the Act and other specific disallowances related to the business activity against which chapter VIA deduction has been claimed result in enhance of the profit of the eligible business and that deduction under chapter VIA is admissible on the profit so enhanced by disallowance. The appellant has not made the claim of section 80IA(4) as there was a loss from business after claiming project expenditure as revenue expenditure at the time of filing of return.

2.12. Honourable Supreme Court in the case of Mahalaxmi Sugar Mills [160 ITR 920J has held that there is a duty cast on the Income Tax Officer to apply the relevant provisions of (he Income Tax Act for the purpose of determining the true figure of assessee's taxable income and the consequential tax liability. Merely because the assessee fails to claim the benefit of a set off, it cannot relive the income tax officer to apply section 24 (set off of loss etc.) in an appropriate case.

2.13. The Honourable Gujarat High Court in the case of S. R. Koshti [276 ITR 165] has held that if an assessee under a mistake, mis-conception or on not being

properly instructed is over assessed the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.

2.14. The Honourable Bombay High Court in the case Of Central Provinces Mangnese Ore [112 ITR 734] has held that mere fact that a deduction was not claimed before the Income Tax Officer is not of much importance, if the liability arises, then a claim can be made bonafide at any stage before the higher authority who is competent to grant relief.

2.15. In view of the above, AO is directed to allow the claim of deduction u/s. 80IA(4) of the Act as per law, after due verification.”

9. The Department is in appeal before us against the aforesaid order passed by the Ld. CIT(A). The Ld. D.R. placed reliance on the observations made by the Ld. Assessing Officer in the assessment order. In response, the Counsel for the assessee submitted that the assessee is eligible for claim of deduction under Section 80-IA(4) of the Act, however, in the return of income, the assessee did not claim deduction under Section 80-IA(4) of the Act since the assessee was into losses, for the impugned assessment year. However, the Counsel for the assessee submitted that in the immediately preceding assessment year i.e. A.Y. 2013-14, the claim of deduction under Section 80-IA(4) of the Act was allowed to the assessee. Further, it was submitted that in the later years as well, up to A.Y. 2018-19, assessee had claimed deduction under Section 80-IA(4) of the Act, which was never disallowed in the assessee's hand (it was submitted before us that for the above assessment years, the case of the assessee had not been picked under scrutiny assessment proceedings). The Counsel for the assessee placed us a copy of the assessment order for A.Y. 2013-14, in which the claim of deduction under Section 80-IA(4) of the Act was allowed to the assessee after due verification. The Counsel for the assessee accordingly, submitted that firstly, the assessee has been allowed deduction under Section 80-IA(4) of the Act both for prior and subsequent assessment years and claim of deduction under Section 80-IA(4) of the Act had

never been denied / disputed in the hands of the assessee, therefore, Ld. CIT(A) has not erred in facts and in law in allowing the claim of deduction in respect to deduction under Section 80-IA(4) of the Act in respect of enhancement made by the Assessing Officer in light of the Gujarat High Court decision in the case of **ITO vs. Keval Construction 33 taxmann.com 277 (Gujarat)**. Secondly, even in the case of associated concern of the assessee, the similar expenditure had been allowed as revenue expenditure and therefore, even otherwise, in the alternative, the assessee company should have been allowed the claim of such expenditure as revenue expenditure.

10. We have heard the rival contentions and perused the material on record.

11. Looking into the instant facts placed before us, we find no infirmity in the order of Ld. CIT(A), so as to call for any interference. From the facts placed on record before us, we observe that the Department on identical set of facts, has allowed the claim of deduction under Section 80-IA(4) of the Act to the assessee both for the earlier assessment year i.e. A.Y. 2013-14 and also for the subsequent assessment years. Therefore, following the principle of consistency, in our considered view there is no infirmity in the order of Ld. CIT(A) in which he had held that assessee is eligible for claim of deduction under Section 80-IA(4) of the Act. Further, for the impugned assessment year, the assessee did not claim deduction under Section 80-IA(4) of the Act for the simple reason that the assessee had incurred losses for the impugned year.

12. In the case of **ITO vs. Keval Construction 33 taxmann.com 277 (Gujarat)**, the High Court held that in case of disallowance / addition on account of non-deduction of TDS liability, this would increase the profits of the assessee from the business of developing housing projects and therefore,

the ultimate profit would increase and the same would qualify for deduction under Section 80-IB of the Act.

13. In the case of **Virtusa (India) Pvt. Ltd. vs. DCIT 41 taxmann.com 244 (Hyderabad Tribunal)**, the ITAT held that the amount of statutory disallowance under Section 40(a)(ia) of the Act has to be considered as business profit eligible for deduction under Section 10A of the Act.

14. In the case of **Sharavathi Pathina Sahakara Sangha Niyamitha vs. ITO 144 taxmann.com 170 (Bangalore Tribunal)**, the ITAT held that where disallowance for non-deduction of TDS liability would increase business income of assessee-society which was eligible for deduction under Section 80P(2)(a)(i), deduction under Section 80P(2)(a)(i) to be allowed on profit as enhanced by sum disallowed under Section 40(a)(ia) of the Act.

15. In the case of **Bartronics India Ltd. vs. ACIT, Circle-1(3), Hyderabad 22 taxmann.com 5 (Hyderabad Tribunal)**, the ITAT held that where the Assessing Officer re-compute profit from eligible business by disallowing certain expenditure and liability under Section 40(a)(ia) of the Act and Section 43B of the Act respectively, the Assessing Officer has to consider additions made and such re-compute profit shall be considered for the purpose of deduction under Section 10B of the Act.

16. In the case of **Commissioner of Income-tax vs. Gem Plus Jewellery India Ltd. 194 taxman 192 (Bombay)**, the High Court held that where the Assessing Officer had enhanced income by disallowing employers as well as employees contribution towards Provident Fund / ESIC, exemption under Section 10A had to be granted on such enhanced income.

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17. Accordingly, in view of the aforesaid decisions, when the claim of the assessee for grant of deduction under Section 80-IA(4) of the Act has not been disputed / disturbed by the Department in either the earlier or later / subsequent years, in our considered view, Ld. CIT(A) has not erred in facts and in law in holding that the assessee is eligible for claim of deduction under Section 80-IA(4) of the Act with respect to income which has been enhanced on account of disallowances made by the Assessing Officer.

18. In the result, the appeal of the Department is dismissed.

This Order pronounced in Open Court on

30/04/2024

Sd/-
(MAKARAND VASANT MAHADEOKAR)
ACCOUNTANT MEMBER

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

Ahmedabad; Dated 30/04/2024

TANMAY, Sr. PS

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad