

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No.3983/Mum/2015

(Assessment Year: 2010-11)

Tatva Global
Environmentcompany
GE(DEONAR) Limited
Uniphos Houe, 11, C.D. Marg, Vs.
Opp Madhu Park,
Khar (W), 400 052

(Appellant)

DCIT 9(3)
Aaykar Bhavan,
M.K. Road,
New Marine Lines
Mumbai-400 020

(Respondent)

PAN No. AADCT2737K

Assessee by : Shri Percy Pardiwala,
Ms. Vasanti Patel, ARs
Revenue by : Shri H.M. Bhatt, DR

Date of hearing: 18.03.2024
Date of pronouncement : 12.06.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Tatva Global Environment (Deonar) Ltd [Assessee/ Appellant] against the appellate order passed by The Commissioner Of Income Tax (Appeals) – 21, Mumbai (the learned CIT – A) dated 19/3/2015 for assessment year 2010 – 11 wherein the appeal filed by the assessee against the assessment order passed by The Deputy Commissioner Of Income Tax – 9 (3), Mumbai (the learned AO) under section 143 (3) of The Income Tax Act, 1961 (The Act) dated 18/3/2013 wherein the return of income [ROI] filed by the assessee on 14/10/2010

declaring a total income of ₹ 169,300/- under the normal provisions of The Income Tax Act and book profit of ₹ 67,923,408/- under section 115JB of the act was assessed at ₹ 68,571,161/- as per normal computation and unchanged book profit u/s 115 JB of the act, was dismissed.

02. Assessee is aggrieved with that and is in appeal before us raising following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the CIT (A) erred in upholding the action of the Assessing Officer in not granting deduction under Section 80IA of Income-tax Act, 1961 (the Act) in respect of the profits of the eligible undertaking amounting to ₹6,84,01,665/-.

2. On the facts and in the circumstances of the case and in law, the CIT (A) erred in upholding the action of the Assessing Officer in holding that the appellant is merely executing the Deonar project as a work contractor for the consortium by an oral contract.

3. Without prejudice to the above grounds of appeal, it is submitted that if the conditions stated in section 80-IA of the Act are held to be fulfilled at any subsequent date, then deduction ought to be allowed from such subsequent date and the said assessment year ought to be treated as the initial assessment year."

03. The only grievance of the assessee is regarding non-granting of deduction under section 80 IA(4) of the income tax act in respect of the profits of the eligible undertaking of ₹ 68,401,665/-. Assessee has also argued alternatively that if the conditions stated under section 80 IA of the act are held to be fulfilled at any subsequent date, then deduction ought to be allowed from such subsequent date and the said assessment year ought to be treated as the initial assessment year.
04. Brief facts of the case show that the assessee is a company engaged in the business of solid West management. It filed its return of income on 14/10/2010 at the total income of ₹ 169,300/- as per normal computation of income claiming deduction under section 80 IA of the act of ₹ 68,401,665/-. The book profit was computed U/s 115 JB of the act of ₹ 67,923,408/-. The return of income was selected for scrutiny and notice under section 143 (2) was issued on 26/8/2011.
05. During the course of assessment proceedings, the fact shows that the assessee company was set up during the previous year relevant to impugned assessment year and is engaged in the business of solid West management. The Municipal Corporation Of Greater Mumbai [The Corporation] in charge of the municipal solid West management of Mumbai through an international bidding process floated a tender on 16/7/2007 for the selection of operator for the work of partial closure and maintenance of the existing dump site and design, engineering,

construction, operation and maintenance of integrated West management facilities on design, build, own, Operate and transfer basis [BOOT] at Deonar, Mumbai [hereinafter referred to as 'Work"']. As per the criteria mentioned in tender floated by the Corporation [1] the bidder or the lead consortium member of the bidding consortium's financial capability will be considered for the purposes of evaluation of the consortium, and it must have a net worth not less than ₹ 50 crore or foreign currency of equivalent value. [2] The technical member of the bid whose technical experience will be taken for the purpose of evaluation of the consortium should have built, constructed, operated at least one land fill having capacity to handle minimum of 1000 tons per day[TPD] of municipal solid West for at least for a period of two years and should have built, constructed and operated at least one processing facility with a capacity to handle 200 tons per day [TPD] of solid West for at least a period of two years. Amemorandum of Understanding [MOU] was entered in December 2007 between three entities, (1) United phosphorous Ltd, a company Incorporated in India, (2) POABS Enviro tax private limited, a company Incorporated in India, (3) Mittel Deutshed Sand Burning and Enstroungnsg Gesell Scharft MBH (MDSE) . As per the MOU the consortium was formed specifically to participate jointly in bidding process for the solid waste management project of the above corporation. It was stated that United phosphorus Ltd would lead the member of the consortium and shall be responsible for the

implementation of the terms of any agreement as lead member with the Corporation. The other two parties would be providing all the technical expertise required for implementing the project for the Corporation. The terms and the validity of the joint venture is also specified in the memorandum of understanding. Technical evaluation was also as per proposal of consortium dated 11/02/2008 . The bid of the consortium was accepted by the Corporation and the project work of waste dumping facility as stated above was awarded to the consortium by letter dated 20/08/2009. Municipal Commissioner issued a letter dated 9/9/2009 to the Secretary Urban development ministry stating that work would commence from 01/10/2009 and necessary permission for handing over the dumping ground to the consortium [concessionaire]

06. Assessee company was incorporated on 12/10/2009. From 27/3/2010 the assessee company became a subsidiary of UPL global eco-investment Holdings private limited, another company of United Phosphorous group. Assessee was issued a Letter of Acceptance [LOA] by the corporation on 30/10/2009. Concession Agreement was entered into with corporation by the assessee company on 18/11/2011.
07. As the assessee company while filing ROI has claimed deduction under section 80 IA of the act assessee of Rs. 6,84,01,685/- . Form No 10CCB dated 24/09/2010 was filed in support of such deduction.

08. Assessee was issued a show cause notice by the learned assessing officer. The assessee explained the facts as stated above before the AO and submitted that assessee is entitled to deduction. Assessee submitted that it complies with all the conditions of that section supported by the certificate in Form No 10 CCB.
09. The Id. AO considered the explanation of the assessee and rejected the deduction claimed by the assessee for the following reasons:-
- i. Assessee company was incorporated only on 12/10/2009 whereas the work was allotted by the Corporation prior to the existence of the company to the JV on 20/08/2009. Thus, the assessee company was not even in existence when the work was awarded by the Corporation to the consortium.
 - ii. The assessee has produced a concession agreement between the assessee company and Corporation in support of its claim that the requirement of agreement for claiming deduction by the assessee is fulfilled. The AO noted that the date of agreement is 18/11/2011 whereas same is not relevant for assessment year 2010 - 11. Therefore, for assessment year 2010 - 11 there was no agreement between the assessee company and the Corporation for granting of deduction under section 80 IA of the act. Thus, the conditions of that section are not fulfilled.

- iii. The work of Deonar Waste management project has been allotted by the Corporation through process of tender to a consortium of bidders as referred above. In the consortium only one foreign company was involved and accordingly the condition number 2 for eligibility to create claim deduction under section 80 IA (4) was not fulfilled as if it is a consortium the member should be incorporated in India. Therefore, the condition mentioned in section 80 IA (4) (i) (a) of the act is not fulfilled.
- iv. The company has an equity share capital of only ₹ 610,000 whereas the qualification criteria mentioned by the Mumbai Corporation was of net worth of ₹ 50 crores and therefore the assessee also does not fulfil the prerequisite of the tender floated by the Corporation. Thus, the assessee company is not eligible for doing the work allotted by the Corporation. The assessee is only operating as a utility vehicle on behalf of the consortium to carry out the work of project or Mumbai Corporation.
- v. The AO repeatedly asked the assessee to submit documents to show how the rights allotted to the consortium have been assigned to the assessee company in respect of Deonar project. The assessee was not in possession of any such document, nor such documents are furnished.

- vi. The assessee company is merely executing the project work as a works contract for the consortium by an oral contract.
- vii. Assessee has not given any explanation for remark made by the auditor in audit report in form number 10 CCB wherein in paragraph number 13 the auditors has stated that :-

The concession agreement with the Corporation is not yet executed till the date of signing of the certificate. Though the management is of the opinion that the same shall be executed shortly. However, considering the fact that the company has received the work order from Corporation and commenced activities according to the shared work order, besides part payment against the said work order has also been received, the management has decided to claim the deduction under section 80 IA of ₹ 68,561,096/- ."

010. Thus, the learned assessing officer has denied the deduction under section 80 IA (4) amounting to ₹ 68,401,665 claimed by the assessee. Accordingly, assessment order under section 143 (3) of the act was passed on 18/03/2013 determining total income of the assessee at ₹ 68,571,161/-.

011. The assessee aggrieved with the assessment order preferred an appeal before the learned CIT - A who

passed appellate order on 19/3/2015 dismissing the appeal of the assessee.

012. The learned CIT - A confirmed the disallowance for following reasons:-

- i. Appellant company was incorporated on 12/10/2009 whereas the Corporation floated the tender on 16/7/2007 and awarded the project to the consortium on 20/08/2009. Thus, on the date of formation of the company tender was already awarded to the consortium and the company was not in existence.
- ii. It is factually incorrect to say that the assessee company is a special purpose vehicle promoted by the Shroff family. Further this company from 27th of March 2010 became a subsidiary of United phosphorus Ltd global eco-investment Holdings private limited. This company was quoted with the meager share capital of ₹ 680,000 and unsecured loan of ₹ 5 crores from holding company and 5 crores from other and therefore the assessee company was not at all competent to participate in bidding and nor was awarded any such solid waste management work by any local authority.
- iii. Concession agreement signed on 27/7/2011 and therefore for financial year 2009 - 10 assessment year 2010 - 11 there is no such concession agreement available.

- iv. As per the memorandum of understanding dated 29/01/2008 United phosphorus Ltd is the lead member and is responsible for performance and implementation of terms of agreement with which Corporation and further other two entities will provide necessary technical expertise for waste processing. These three consortium members have a definite stake in the consortium therefore it is evident that the consortium is the only responsible bidder and not the assessee company.
- v. The land allotment was also given by the Mumbai municipal Commissioner to the consortium and not to the assessee company. Letter dated 09/09/2009 is clear on this issue.
- vi. Works contract was given to the appellant for execution of work and assessee company is to be regarded as a 'contractor' or executor of work assigned to consortium and therefore explanation under section 80 IA (4) is applicable which provides that the deduction is to be granted to the developer of infrastructure facility but not to a contractor.
- vii. The note given by the auditor in form number 10 CCB has mentioned with full reservation that the appellant has received solid waste management system contract and concession agreement was not yet executed till the date of signing of the certificate on 24/9/2010 and therefore obviously during financial year 2009 - 10 no such concession

agreement was available. Thus, there was no contract available for infrastructure facility.

viii. Even the revenue recognition policy of the assessee company clearly shows that the assessee is merely a contractor.

013. Therefore, the assessee is aggrieved and is in appeal before us. Arguing ground number one, the learned authorized representative referred to a paper book containing 269 pages filed by the assessee. He firstly referred to page [6] wherein the copy of request for proposal [RFP] dated 16 July 2007 issued by the Mumbai municipal Corporation which was issued on 16/7/2007 and the main conference was arranged on 16/8/2007 referred to the request for proposal for the work wherein it is mentioned that selection of operator for partial closure and maintenance of the existing dump site and design, engineering, construction, operation and maintenance of integrated waste management facilities on the line, build, own, operate and transfer basis at Deonar Mumbai. Referring to page number [8] he referred to the qualification criteria mentioned therein. According to the qualification criteria the bidder for the lead consortium member of bidding consortium should have the financial capacity and must have networth not less than ₹ 50 crores. On page number 17 he referred to the scope of work for the project. He submits that at paragraph number 3.1 of the eligibility criteria bidding member of the bidding consortium must be duly incorporated into

the company under the relevant jurisdiction. He further referred to paragraph number 5.4 wherein it is mentioned that there are rules for consortium for the project. It is mentioned that the selected bidder will be required to incorporate a special purpose vehicle to domicile the project prior to the signing of the concession agreement or start of the implementation of the project. It is further provided that equity shareholders of the lead member of the consortium should have the issued and paid-up capital of the concession not less than 51%. He further referred to page number 40 of the paper book where a memorandum of Understanding dated 29 January 2008 was entered into amongst members of the consortium wherein all the parties have entered into an understanding that they will jointly participate in the bid process and submit the tender for the solid waste management project of the Corporation. United Phosphorus Ltd was the lead manager and will submit the bid on behalf of the consortium. He also referred to letter dated 20/8/2009 from Municipal Corporation of Greater Mumbai to the consortium wherein it was stated that consortium has been selected as an operator for the above project based on the terms and conditions made in the request for a concession agreement along with amendments made from time to time. Our attention was drawn to page number 197 where in a letter of acceptance [LOA] issued by the Municipal Corporation of Greater Mumbai in the name of the assessee company by way of a letter dated 30/10/2009. By this letter it is stated that the Corporation

has accepted the assessee as a concessionaire for the project and in SPV to the contract for a period of 25 years. In that letter once again broad scope of work, grounds to concessionaire and rights associated therewith, sale and marketability of recyclable material, execution of concession agreement and terms and conditions are mentioned. As per para number four of that letter wherein execution of concession agreement is mentioned that within seven days from the date of issue of this letter of acceptance the concessionaire executes the letter of acceptance and return the same to the Mumbai Corporation. He referred to page number 222 which is a concession agreement between municipal Corporation of greater Mumbai and the assessee dated 18 November 2011. Therefore, he submits that the letter of acceptance was issued by municipal Corporation of greater Mumbai to the assessee on 30/10/2009 and which has resulted in a concession agreement dated 18/11/2011. Thus, according to him letter of acceptance is work awarded to assessee by the Corporation on 30/9/2009. He also referred to the annual accounts of the assessee company as at 31st of March 2010 and submitted that income from operation of the assessee company for that year is ₹ 33.25 crores, operating expenses of ₹ 26.48 crores, assessee following percentage completion method adopting accounting standard 7 of construction contracts recognizing the revenue. He further submitted that reference to form number 10 CCB is correct as on that date the concession agreement was not entered into. He also referred to the

provisions of section 80 IA (4) and submitted that assessee has fulfilled all the conditions and based on that it claimed deduction under section 80 IA of the act.

014. According to him the learned assessing officer has disallowed the claim of the assessee merely because of the reason that concession agreement 18/11/2011 was entered into subsequent financial year and therefore the financial year relevant to the impugned assessment year there was no agreement and therefore the assessee was not entitled to deduction under section 80IA(4) of the act. He further stated that the learned assessing officer has also stated that explanation to that section which denies deduction to the contractor was also applied. He further stated that the learned CIT – A also held that there is no contract between the assessee as required under provisions of section 80IA(4) of the act. The learned CIT – A also denied the deduction for the reason that no deduction is allowable to a works contractor.

015. His main argument was that the letter of acceptance was issued to the assessee on 30/10/ 2009 and assessee was incorporated on 12/10/2009. This letter of acceptance is issued in the name of the assessee and therefore the assessee entered into a contract with the Corporation on that date. The assessee is a special purpose vehicle which has been formed by all the members of consortium for carrying on of that work mentioned in Request for Proposal of the Corporation. He submitted that the contract requires an offer and acceptance that is

completed and letter of acceptance itself is a contract which is dated 30/10/2009. It was stated that the letter of acceptance is in the name of the assessee company and a concession agreement was also entered into by the assessee company. Further the contract work is also carried out by the assessee company itself for which revenue has been shown in the profit and loss account. He further referred to letter dated 20/08/2009 placed at page number 193 of the paper book which is a letter written by municipal Corporation of greater Mumbai to the concession wherein in paragraph number two it is mentioned that a joint-venture company was required to be formed. The learned authorized representative further referred to paragraph number 3.6 of the order of the learned CIT – A wherein it has been stated that he has used the MOU dated 29/1/2008, work order of Corporation, letter dated 20/08/2009 issued by the Corporation, concession agreement dated 27/7/2011 and request for proposal etc. He once again referred to that letter dated 20/8/2009 on page number 193 which is ignored by the learned CIT – A. He further referred to paragraph number [3] of the appellate order wherein as per the terms and condition of request for proposal the appellant is not eligible for any such project, thus he submitted that request for proposal itself says that there would be a special purpose vehicle to be formed. He further referred to paragraph number 3.11 of the appellate order wherein it is mentioned that appellant company is not at all competent to Bid and be awarded such solid

waste management work is incorrect as in the request for proposal also a special purpose vehicle was required to be formed. He further referred to paragraph number 3.10 of the appellate order and stated that the learned CIT – A has not given any finding with respect to the fact that letter of acceptance issued by the Corporation itself is an agreement. He therefore submitted that the order of the learned CIT – A in ignoring the letter of acceptance which itself is contract is not sustainable. With respect to the several decisions cited by the learned CIT – A stating that the deduction is not available to contractor, it was submitted that the above decisions have been reversed by the honourable Bombay High Court in case of ABG industries Ltd and are no more relevant. Thus, the order of the learned CIT – A is not sustainable, and the assessee is entitled to deduction under section 80 IA (4) of the act.

016. The learned Departmental representative vehemently supported the order of the learned assessing officer and the learned CIT – A holding that assessee does not satisfy the conditions laid down under section 80IA (4) of the act. He further submitted that assessee has not entered into an agreement with the Central government or any local authority for development of infrastructure facility. Therefore, the assessee is not entitled to deduction. Further the assessee is a contractor and therefore hit by the explanation to section 80 IA (4) of the act. He further submitted that when the contract was awarded, the assessee was not at all into existence therefore for this year the assessee is not entitled to deduction at all. It

was further stated that the assessee has failed to show how the rights allotted to the company by consortium and who are the shareholders of that company. The Id. AO held that this information was not given to Id. AO. He further submits that CIT A(0 has stated that assessee company is owned by UPL group and not by consortium. Thus, Assessee is not eligible for deduction u/s 80IA (4) of the Act.

017. We have carefully considered the rival contention and the orders of the learned lower authorities. The municipal Corporation of greater Mumbai floated tender for partial) maintenance of existing site and design, engineering, construction, operation, and maintenance of integrated waste Management facility on design, B, own, operate and transfer(DBOOT) basis at Deonar , Mumbai. As per the request for proposal of the work the date of issue of bid was 16/7/2007, date of Prebid conference was 16/08/2007 and date of the submission of bid was 23/10/2007. A consortium of United phosphorus Ltd, POBAs Enviro Tech private limited and MDSE made a bid for the project. This consortium was a successful bidder. Therefore, a Memorandum of understanding was entered into on 29/1/2008 amongst these three entities on 29 January 2008 prior to submitting the technical made on 11 February 2008. On 20 August 2009 the Corporation intimated the consortium that there joint-venture company has been selected as an operator for the above project based on the terms and conditions mentioned in the request for proposal document and concession

agreement along with amendments made to it from time to time. On 12 October 2009, the assessee company was incorporated. On 30/10/2009, when Municipal Corporation of greater Bombay through its chief engineer of solid West management issued a letter of acceptance in favour of the appellant company wherein reference was made to request for proposal due on 23/10/2007 which was extended up to 11/2/2008 along with the addendum and corrigendum number 1 and 2 for selection of operator for partial closure and maintenance of existing dump site and design, engineering, construction, operation and maintenance of integrated waste Management facility on design, build, own, operate and transfer basis at Deonar Mumbai. By this letter it was stated that Corporation has accepted the offer of the assessee for the subject project in the name of assessee company as concessionaire. In the letter of acceptance, the broad scope of work, ground to concessionaire and rights associated therewith, sale and marketing of recyclable material and products from processing, execution of concession agreement providing seven days of the date of issue of letter of acceptance such agreement is required to be entered into, execution of lease agreement, terms of payment and several other terms and conditions which are almost similar to the request for proposal was mentioned. By this letter assessee was asked to comply the requirement of execution of concession agreement for completing the formalities. Naturally, on completion of these formalities on 18 November 2011 the concession agreement was

entered into by the assessee and Municipal Corporation of greater Mumbai. Based on this at the time of filing ROI assessee claimed deduction u/s 80 IA of the Act of Rs 6.84.01.565/- on profits of eligible business profit of Rs. 6,85,70,960/-. Form No 10CCB was furnished wherein column no 13 the auditor has clearly stated that concessionaire agreement is not executed by the corporation in favour of the assessee till the date of filing of ROI. Clearly the concessionaire agreement was made by assessee with corporation on 18/11/2011 and it was not executed at the time of filing of ROI. Thus, if concessionaire agreement is the "agreement" to be considered in terms of section 80 IA (4) (i)(b), then naturally it does not exist for the year in question. Consequently, assessee cannot be allowed deduction. But now assessee submits that the Letter of Acceptance dated 30/10/2009 is the agreement than at least, from that date, subject to other conditions, assessee's claim deserves attention. This was also submitted before the Id. CIT (A), but he has not discussed this aspect before. Further assessee has also not furnished details before the Id. AO that how the assessee company was transferred the right of allotted work by JV when this company is owned by one of the members of the consortium. No agreement between the consortium members with the assessee company to this effect was produced before the Id. Ao.

018. In these circumstances, the matter needs to be examined afresh that :-

- (i) Whether the Letter of Acceptance can be an agreement envisages u/s 80IA (4) (i) (b) of the Act or not.
- (ii) Further the alternative contention of the assessee is that if the letter of acceptance is the agreement, then from that date the assessee is eligible for deduction u/s 80 IA (4) of the Act.
- (iii) Whether explanation to section 80 IA applies to the assessee or not and
- (iv) how the rights of consortium were transferred to the assessee company, as these details were not furnished before the Id. AO.

The Id. AR and Id. DR also did not object to this but in fact agreed to this reexamination of the claim afresh in light of the above.

019. In view of this we restore the matter back to the file of the Id. Ao to reexamine the whole issue afresh, after giving an opportunity of hearing to the assessee to substantiate its claim, decide in accordance with law. Accordingly, All Grounds of appeal are restored to the file of the Id. AO.

020. Order pronounced in the open court on 12.06.2024.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)



Mumbai, Dated: 12.06.2024

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,

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