

आयकर अपीलीय अधिकरण, 'एच' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "H" BENCH

सर्वश्री बी.आर. बास्करन ,लेखा सदस्य एवं राम लाल नेगी, न्यायिक सदस्य
Before S/Sh. B.R. Baskaran, Accountant Member & Ram Lal Negi, Judicial Member

आयकर अपील सं/.ITA No.2886/Mum/2013, निर्धारण वर्ष/Assessment Year-2008-09

Hydroair Tectonics (PCD) Ltd. 116, Raheja Arcade Plot No.61, Sector-11, Belapur Navi Mumbai-400 020. PAN: AAACH 9686 C	Vs	ACIT-Range10(3) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : S/Shri Vallabhdas D. Parmar and S.K. Kedia-AR
राजस्व की ओर से/ **Revenue by** : Shri Chandra Vijay-DR

सुनवाई की तारीख/ Date of Hearing : **23.02.2016**
घोषणा की तारीख / Date of Pronouncement : **02-03-2016**

ORDER

लेखा सदस्य बी.आर. बास्करन के अनुसार/ Per B.R. Baskaran, AM-

The assessee has filed this appeal challenging the order dated 16.01.2013 passed by the Id. CIT(A)-37, Mumbai for the AY 2008-09.

2. At the time of hearing Id. Counsel appearing for the assessee did not press Ground Nos. 3 and 4. Accordingly, those grounds are dismissed as not pressed.

The remaining grounds relate to the following two issues:-

- a) Disallowance made u/s. 14A of the Act and
- b) Rejection of deduction claimed u/s. 80IA of the Act.

3. We have heard the parties and perused the record. The assessee company is engaged in the business of Environment Engineering and allied activities.

3.1 The first issue relates to disallowance made u/s. 14A of the Act. During the year under consideration, the assessee earned a dividend income of Rs.2,000/- from the shares held in Vijaya Bank Ltd and claimed it as exempt. The assessee did not make any disallowance u/s. 14A on the reasoning that it did not incur any expenditure to earn the exempt dividend income of Rs.2,000/-. However, the Assessing Officer worked out the disallowance as per Rule 8D of the IT Rules and accordingly disallowed a sum of Rs.19,20,787/-, which was also confirmed by CIT(A).

3.2 The Ld. Counsel invited our attention to the schedule of investment given in the Annual Report and submitted that the assessee has made investment in the following companies:-

- i) Jankalyan Sahakari Bank,
- ii) PRIA CETP (India) Ltd. And
- iii) Vijaya Bank Ltd.

3.3 The Id. Counsel submitted that the dividend received from Jankalyan Sahakari Bank(JSB) is taxable and hence, the provisions of section 14A are not applicable to it. He has further submitted that PRIA CETP (India) Ltd. (PCIL) is a subsidiary of the assessee company and hence, investment made therein is a strategic investment. He further submitted that the assessee has not made any fresh investment either in PCIL or in Vijaya Bank Ltd.(VBL) during the year under consideration, meaning thereby, both the shares have been brought forward from the earlier years. He further, submitted that the dividend income of Rs.2,000/- has been directly credited to the bank account of the assessee.

Accordingly, he contended that the provisions of section 14A shall not be applicable to the facts prevailing in the instant year. He further submitted, that the Assessing Officer, did not comply with the mandatory condition prescribed u/s. 14A of the Act before applying the provisions of Rule 8D, i.e., he did not record his dis-satisfaction with the claim made by the assessee by having regard to the accounts of the assessee. Accordingly, he submitted that the disallowance made u/s. 14A of the Act deserves deletion.

3.4 On the contrary, the Id. Departmental Representative (DR) placed strong reliance on the order passed by the CIT(A) on this issue.

3.5 Having heard rival submissions, we find merit in the contentions of the assessee with regard to the facts available on this issue. We have earlier noticed that the dividend received/receivable from PCIL and VBL alone are exempt. These investments have been made in the earlier years and further the investment made in PCIL was a strategic investment. The assessee has received dividend income of Rs.2,000/- only during the year under consideration and the said dividend income has also been directly credited to the bank account of the assessee. Considering the smallness of the dividend income and also considering the fact, that the investment in shares have been made in the earlier years, we are of the view that there is merit in the contentions of the assessee that it did not incur any expenditure in relation to the dividend income. Further, as contended by Ld A.R, the AO did not reject the contentions of the assessee by having regard to the accounts of the assessee. Hence, we find no reason for invoking the provisions of Rule 8D of the I.T. Rules in the hands of the assessee for the year under consideration. Accordingly, we set aside the order of the

CIT(A) on this issue and direct the Assessing Officer to delete the disallowance made u/s. 14A of the Act.

4. The next issue relates to rejection of deduction claimed u/s. 80IA of the Act.

4.1 During the year under consideration, the assessee had undertaken a project to develop, operate and maintain an infrastructure facility for its MSW/CETP projects on BOOT basis. The assessee claimed deduction u/s. 80IA of the Act in respect of two units, viz., Rs.6.22 crores in respect of Roha unit and Rs.2.49 crores in respect of Ichalkaranji Unit. The Assessing Officer examined the claim of the assessee in terms of provisions of section 80-IA(4) of the Act. The said provisions read 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 con sortium 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 infra structure facility on or after the 1st April, 1995:

The AO noticed that the assessee has entered into a MOU with R.I.A.C.E.P.T Co-operative Society only, whereas the provisions of sec. 80IA(4) require that "an agreement should be entered with the Central Government or a State Government or a local authority or any other statutory body". Accordingly, the AO rejected the claim for deduction u/s 80IA in respect of Roha unit.

4.2 During the course of appellate proceedings, the Ld CIT(A) called for a remand report from the AO, since the assessee appears to have claimed that it along with RIA CETP Co-op Society Ltd has entered into a MOU with Maharashtra Industrial Development Corporation (MIDC) and further it was claimed that the MOU should be treated as an agreement specified in sec. 80IA(4)(i)(b). However, the AO reported in the MOU that MIDC was acting only as facilitator and accordingly stood by his order. The Ld CIT(A) was convinced with the remand report and he further observed that:-

(a) the assessee has not brought any material on record to show that it was effectively maintaining the new infrastructure facility.

(b) the assessee has acted as contractor and further it is not shown that the infrastructure facility was operated under BOOT basis.

(c) The assessee has subsequently filed a return of income u/s 153A of the Act in pursuance of search proceedings, wherein the profit and loss account has been revised by the assessee.

With the above said observations, the Ld CIT(A) confirmed the order of the AO on this issue.

4.3 We heard the parties on this issue and perused the record. We notice that the issue under dispute is about the nature of "MOU" entered between the assessee along with M/s R.I.A CETP Co-op Society Ltd and M/s MIDC.

According to the assessee the MOU satisfies the characteristics of an "agreement", whereas according to the AO, the same cannot be considered to be an agreement. Though MIDC is accepted as a Statutory body, the AO has observed that the MIDC only acts as a facilitator. Besides the above, the Ld CIT(A) has also made some more observations, as discussed above.

4.4 It is a well settled proposition of law that the nomenclature given to a document will not decide its characteristics, i.e., the substance will prevail over the form. The main characteristics of a commercial agreement, inter alia, consists of ordinarily the clauses relating to

- (a) Scope of contract or work to be executed.
- (b) Consideration involved and payment terms.
- (c) Clear specification of scope, risks and responsibilities of each of the parties
- (d) Time period for completion of contract
- (e) Liability clause in case of failure to adhere to contract terms.

If the understanding reached between the parties encompasses the above terms, in our view, the same would constitute an "agreement" and the same should be considered as an agreement mentioned in sec. 80IA(4)(i)(b) of the Act. We notice that the tax authorities have not examined the MOU in the above said lines and accordingly, we are of the view that this issue requires fresh examination at the end of the AO.

4.5 We have earlier noticed that both the AO as well as the Ld CIT(A) has made some more observations to support the rejection of the claim for deduction u/s 80IA of the Act. The Ld A.R submitted that the assessee shall be in a position to satisfy the AO with regard to those observations also. Accordingly, we are of the view that the entire matters relating to the deduction u/s 80IA

including the various adverse features noted down by the AO/CIT(A) requires fresh examination.

4.6 Accordingly, we set aside the order of Ld CIT(A) on this issue and restore all the issues relating to the deduction u/s 80IA(4) of the Act to the file of the AO for fresh examination. The assessee is also directed to furnish all the details that may be called for by the AO in this regard. After hearing the assessee, the AO may take appropriate decision in accordance with the law.

5. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 2nd March, 2016
आदेश की घोषणा खुले न्यायालय में दिनांक 2 मार्च, 2016 को की गई।

Sd/-

(राम लाल नेगी / **Ram Lal Negi**)
न्यायिक सदस्य / **JUDICIAL MEMBER**

मुंबई/Mumbai, दिनांक/Date: 02.03. 2016

व.नि.स. *Jv.Sr.PS.*

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

1. Appellant /अपीलार्थी
/प्रत्यर्थी

2. Respondent

3. The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.** The concerned CIT /संबद्ध आयकर आयुक्त

5. DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ, आ.अ.न्याया.मुंबई

6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**