HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

ITA No.35/2013
c/w
ITA No.36/2013.
ITA No.37/2013 &
ITA No.39/2013

1. Commissioner of Income Tax **Vs.** M/s TRG Industries Pvt. Ltd.
2. Commissioner of Income Tax **Vs.** M/s TRG Industries Pvt. Ltd.
3. Commissioner of Income Tax **Vs.** M/s TRG Industries Pvt. Ltd.
4. Commissioner of Income Tax **Vs.** M/s TRG Industries Pvt. Ltd.

Coram:

Hon'ble Mr. Justice Ramalingam Sudhakar, Judge
Hon'ble Mr. Justice B.S.Walia, Judge

Appearing counsel:

For the Appellant/petitioner (s): Mr.K.D.S. Kotwal, Advocate.

For the respondent(s) : Mr.Subash Dutt, Advocate with Mr. Suraj S. Wazir, Advocate.

(a) Whether approved for reporting in Digest/Law Journal-Net : Yes

(b) Whether approved for reporting in Press/Media : Yes

1. The four appeals have been filed by the Revenue raising the following substantial questions of law which reads as follows:

ITA No.35/2013

(i) Whether on facts and circumstances of the case, the ITAT Amritsar was justified in treating the assessee company as a developer within the meaning of section 80-IA(4) of the Income Tax Act, 1961 when in fact the assessee had merely executed a work contract for IRCON International Ltd. for construction of some part of the Railway bridge and works contract under section 80-IA(4) of the Income Tax Act, 1961 were clearly ineligible for deductions.

(ii) Whether the ITAT did not err in law when it placed reliance on the judgments which were not applicable to the case of the assessee.

(iii) Whether the ITAT did not err in interpreting the provisions of the Income Tax Act 1961 when it held that there was no bar for a contractor to be

a developer for purposes of benefits of section 80-IA(4) of the Income Tax Act, 1961.

(iv) Whether on facts and circumstances of the case, the ITAT Amritsar was justified in allowing the loss of Rs.7,85,590/- on account of Quota written off by treating as revenue expenditure when it was actually a capital loss as the assessee had stopped its business and not suffered losses in business?

ITA No.36/2013

(i) Whether on facts and circumstances of the case, the ITAT Amritsar was justified in treating the assessee company as a developer within the meaning of section 80-IA(4) of the Income Tax Act, 1961 when in fact the assessee had merely executed a work contract for Airport Authority of India for extension of runway and works contract under section 80-IA(4) of the Income Tax Act, 1961 were clearly ineligible for deductions.

(ii) Whether the ITAT did not err in law when it placed reliance on the judgments which were not applicable to the case of the assessee.

(iii) Whether the ITAT did not err in interpreting the provisions of the Income Tax Act 1961 when it held that there was no bar for a contractor to be a developer for purposes of benefits of section 80-IA(4) of the Income Tax Act, 1961.

ITA No.37/2013

(i) Whether on facts and circumstances of the case, the ITAT Amritsar was justified in treating the assessee company as a developer within the meaning of section 80-IA(4) of the Income Tax Act, 1961 when in fact the assessee had merely executed a work contract for Airport Authority of India for extension of runway and works contract for U.P. Government for construction of bridge and works contract under section 80-IA(4) of the Income Tax Act, 1961 were clearly ineligible for deductions.

(ii) Whether the ITAT did not err in law when it placed reliance on the judgments which were not applicable to the case of the assessee.

(iii) Whether the ITAT did not err in interpreting the provisions of the Income Tax Act 1961 when it held that there was no bar for a contractor to be a developer for purposes of benefits of section 80-IA(4) of the Income Tax Act, 1961.

ITA No.39/2013

(i) Whether on facts and circumstances of the case, the ITAT Amritsar was justified in treating the assessee company as a developer within the meaning of section 80-IA(4) of the Income Tax Act, 1961 when in fact the assessee had merely executed a work contract for Airport Authority of India for extension of runway and works contract under section 80-IA(4) of the Income Tax Act, 1961 were clearly ineligible for deductions.

(ii) Whether the ITAT did not err in law when it placed reliance on the judgments which were not applicable to the case of the assessee.

(iii) Whether the ITAT did not err in interpreting the provisions of the Income Tax Act 1961 when it held that there was no bar for a contractor to be a developer for purposes of benefits of section 80-IA(4) of the Income Tax Act, 1961.

2. The factual background that led to present appeal is as follows:-

3. The respondent assessee is a Company engaged in development of infrastructure like Airport, railway bridges etc. The petitioner during the four relevant years, participated in Tenders floated by the Government, Public Sector Undertaking or Government agency for construction of bridges and for developing or improving Airport facility.

4. Being the successful tenderer, the respondent-assessee executed the work and in relation to the profits and gains that was derived from those contracts, the assessee claimed deduction in terms of Section 80-IA (4) of the Income Tax Act. The

assessing officer in respect of each assessment year accepted the plea for deduction under Section 80-IA (4) partially in some assessment year and denied it fully in some assessment year.

5. The assessee filed Appeals before the CIT Appeals in respect of each assessment year who confirmed the assessment order. Therefore, four appeals were filed by the assessee before the Tribunal. The Tribunal heard the appeals and disposed of the same by a common order accepting the plea of the assessee, and allowed the appeals. Aggrieved thereby, the revenue is before us raising questions of law referred to above.

6. Before we embark on the legal issue to summarize the nature of claim, we will go into the nature of work undertaken by the assessee in respect of each assessment year.

S. No.	ITA No.	Assessment year	Nature of work	Remarks
1	ITA No.39/2013	2003-2004	Extension of Run Way at Bhubaneshwar Airport	Deduction denied.
2.	ITA No.36/2013	2004-2005	(i) Extension of Agartala Airport (Airport Authority of India) (ii) Construction of Railway bridge at Chambal Kowari	Deduction denied. Deduction allowed under Section 80 IA (4) allowed in respect of railway contract.
3.	ITA No.35/2013	2005-2006	Railway Vikas Nigam allotted the work to Ircon International Limited and project was handed over to the assessee for construction of railway bridge on river Kuakhai	Deduction denied.
4.	ITA No.37/2013	2006-2007	i) Contract allotted by Airport authority of	Deduction denied.

			India for extension of Bhubaneswar Airport. ii) Contract for construction of bridge allotted by UP Government	Deduction denied.

7. In respect of the aforesaid contract executed, the assessing officer in the case of assessment year 2004-2005 allowed deduction under 80-IA (4) in respect of Railway Bridge constructed over Chambal Kowari but denied it in respect of contract relating to extension of Airport of Agartala. However, in so far as the other assessment years, the Assessing Officer while deniying the deduction was of the view that the requirement is that the execution of the contract should be such that the condition contained in Section 80-IA (4) should be complied cumulatively. Merely by executing the contract, assessee only is developing a part of Airport or constructing a bridge. The Assessee, therefore, would not be entitled to benefit of Section 80-IA (4)(i)(c) as he does not comply with the conditions in its totality.
8. The Commissioner appeals concurred with such finding holding that compliance should be cumulative and cannot be part compliance. The Tribunal however did not accept such a contention on behalf of the department and accepted the assessee plea by holding that the provisions of Section 80-IA (4)(i)(c) and amended Section 80-IA (4)(i)(b) with effect from 01.04.2002, the explanation to Section 80-IA (4)(i)(c) with effect from 01.04.2002 in terms of the Finance Act, 2002 makes it clear that Section 80-IA (4)(i)(c) contemplates development of infrastructure facility in respect of road, bridge, rail system and Airport as well. The deduction is allowable if the enterprise carries on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility as contained in

Section 80-IA 4 (i). The word 'or' has been held to be read as disjunctively and that each of the enterprise, i.e. (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining of a new infrastructure facility should be read independently and if the assessee fulfils one of the above conditions, he will be entitled to benefit of Section 80-IA (4)(i)(c) of the Act. The Tribunal held that the assessee will fall under the category of developer. Therefore, the Assessing Officer and the CIT appeals were not correct and misread the provisions of Section 80-IA (4). The Tribunal finding is as follows:

> **"15.3.** It is pertinent to mention here that the AO in the remand report has reported in last para at page 2 of the report that deduction u/s 80IA is admissible to the assessee who develop, operate or maintain the Airport. As per findings of the AO and as per remand report of the AO, all these three conditions should be cumulative. Whereas the law has been amended, as mentioned hereinabove. As per new provision, deduction is allowable to any enterprises carrying on the business of:
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> (i) developing or
> (ii) operating and maintaining or
> (iii) developing, operating and maintaining of any infrastructure facilities.
>
> **15.4** The AO did not appreciate the new provisions where the word "or" is used which means that each provision is independent to each other and accordingly if a person fulfils any of the above three conditions, then he will be said to have complied with the conditions laid down under section 80-IA (4) of the Act. The first limb as mentioned hereinabove is that of 'developing' and in the present case, the assessee is claimed to be a developer. Therefore, the AO is not justified in reading all the above three conditions

cumulatively and accordingly we are of the view that the above three conditions have to be read separately and if the assessee fulfils any of the three conditions as laid down under section 80-IA (4), the claim u/s 80-IA cannot be denied."

9. At this juncture, it will be relevant to note that the Revenue has issued a Circular bearing No.4 of 2010 on 18th May, 2010 in relation to the benefit claimed under Section 80-IA(4)(i) in respect of a person developing infrastructure facility in the nature of widening of existing road, the claim of deduction to be allowed. The aforesaid Circular reads as follows:

"CIRCULAR NO.4 OF 2010, DT. 18TH MAY, 2010

18/05/2010

Widening of existing road—Definition of a new infrastructure facility—Clarification regarding DEDUCTIONS

SECTION 80-IA(4)

References have been received by the Board as to whether widening of existing roads constitutes creation of new infrastructure facility for the purpose of Section 80-IA(4)(i) of the Income Tax Act, 1961,

Section 80-IA(4)(i) provides for a deduction to an undertaking engaged in developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility subject to satisfaction of the conditions laid down in the section. The Explanation to sub-Section 80-IA(4)(i) states that for the purpose of this clause, infrastructure facility means inter alia:-

"(a) a road including toll road, a bridge or a rail system;

(b) a highway project including housing or other activities being an integral part of the highway project;"

The issue has been examined by the Board. It has been decided that widening of an existing road by constructing additional lanes as a part of a highway

project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). However, simply relaying of an existing road would not be classifiable as a new infrastructure facility for this purpose.

[F.No.1778/14/2010-ITA.I]
(2010) 232 CTR (St) 231"

8. Reliance was placed on the decision of the Bombay High Court in *CIT Vs. ABG Heavy Industries Ltd & Ors. reported in 231 CTR 127/322 ITR 323.*

11. We have heard the learned counsel for both the sides.

12. The provisions of Section 80-IA (4)(i) and 'explanation' reads as follows:

Section 80-IA (4)(i)

"(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:

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the

> Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.
>
> *Explanation.*—For the purposes of this clause, "infrastructure facility" means—
>
> (*a*) a road including toll road, a bridge or a rail system;
>
> (*b*) a highway project including housing or other activities being an integral part of the highway project;
>
> (*c*) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;
>
> (*d*) a port, airport, inland waterway, inland port or navigational channel in the sea."

13. The first and the foremost requirement is that the assessee developer should come within the ambit of Section 80-IA **(4)(i)(a)(b)** which the assessee satisfies. There is no dispute since there is a valid contract as required. The next requirement for the benefit to be extended under the said provision is that the enterprise should provide an infrastructure facility in relation to establishing a road, a bridge or a rail system or Airport. There is no specific intendment as to the nature of work to be undertaken as is evident from the explanation. Therefore, the word contained therein has wide amplitude. The Assessing officer was not correct in prescribing certain limits and describing the nature of work. In other words, the assessing authority attempts to dissect the contract and hold that it does not justify the claim for deduction. That we are not inclined to accept such an Endeavour which is legally impermissible. If the requirement of Section 80-IA (4)(i)

and Section 80-IA (4)(i)(c) explanation is satisfied, then the benefit has to flow.

14. The provisions of Section 80-IA (4)(i) applies to an enterprise carrying business of a developer, who satisfies the requirement of Section **80-IA 4(i)(a)(b)** and provides an infrastructure facility as set out in the explanation.

15. If the provision is read as a whole and the explanation is read in terms of the said provision, it would amply be clear from the facts of the present case that the assessee in this case is an enterprise carrying on the business of a developer, has entered into an agreement with the Central Government or the State Government or an authority prescribed under Section 80-IA (4)(i)(b) and has provided the infrastructure facility in terms of explanation to Section 80-IA(4)(i)(c), the details of which are set out in the chart. Then the requirement of the above provision has been complied.

16. The Assessing Officer in this case has endeavoured to read more into the provision by describing what is the nature of work that will qualify for the benefit of deduction under Section 80-IA(4) by going into the terms of the Contract. The authority has stated what are the nature of the infrastructure that will qualify for the benefit under the above provision. We fail to see how the provisions of Section 80-IA 4(i)(a)(b) can be qualified when the words in the explanation is stated in a clear and inclusive definition. The authority is bound to consider the claim as is contained in the provisions. If certain works are accepted as infrastructure facility and other works denied at the whim of one or other authority it will lead to an incongruous result whereby different assessing officers will take different yardsticks. The proceedings will thereby become arbitrary and capricious. This position will be clear from the stand of one Assessing Officer who held that the benefit of

Section 80-IA(4) will be available to the assessee in the case of construction of Railway Bridge for the Assessment year 2004-2005(ITA No.36/2003) whereas he has taken a different stand insofar as assessment year 2006-2007 (ITA No.37/2003) and denied deduction. This fortifies our concern. The department is not entitled to take inconsistent stand in respect of each assessment year on the same set of facts. This principle has been well explained by the Supreme Court in the case of ***M/s Radhasoami Satsang, Saomi Bagh, Agra vs. Commissioner of Income Tax,*** (1992) 1 Supreme Court Cases 659.

> "13. One of the contentions which the learned senior counsel for the assessee-appellant raised at the hearing was that in the absence of any change in the circumstances, the Revenue should have felt bound by the previous decisions and no attempt should have been made to reopen the question. He relied upon some authorities in support of his stand. A full Bench of the Madras High Court considered this question in T.M.M Sankaralinga Nadar & Bros. & Ors, v. Commissioner of Income-Tax, Madras, 4 ITC 226. After dealing with the con- cession the Full Bench expressed the following opinion:
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> "The principle to be deducted from these two cases is that where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, e.g., whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income; such questions if decided by a Court on a reference made to it would be res judicata in that the same question cannot be subsequently agitated."
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> 14. One of the decisions referred to by the Full Bench was the case of Hoystead &Ors. v. Commissioner of Taxation 1926 AC 155. Speaking for the Judicial Committee Lord Shaw stated:
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> "Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be proper apprehension by the Court of the legal result either of the construction of the document or the weight of certain circum- stances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principal of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and

> traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."
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> These observation were made in a case where taxation was in issue.
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> 15. This Court in Parashuram Pottery Works Co. Ltd. v. Income-Tax Officer, Circle 1, Ward A, Rajkot, (1977)106 ITR 110 stated:
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> "At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity."
>
> Assessments are certainly quasi-judicial and these observations equally apply.
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> 16. We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.
> 17. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter- and if there was not change it was in support of the assessee- we do not think the question should have been reopened and contrary to what had been decided by the Com- missioner of Income-Tax in the earlier proceedings, a dif- ferent and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirma- tive, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was enti- tled to exemption under Sections. 11 and 12 of the Income Tax Act of 1961.

17. As to the power of the taxing authority to re-write the terms of the agreement arrived between the parties at arm's length, the Supreme Court in the case of ***Mangalore Ganesh Beedi Works vs. Commissioner of Income Tax, Mysore***, (2016) 2 Supreme Court Cases 556, disapproved such an endeavour as impermissible. It approved the view of the Delhi High Court in ***D. S. Bist & Sons vs.***

Commissioner of Income Tax, (1984) 149 ITR 276 (Del).

> "32. In this context, it may also be mentioned that by denying that the trade marks were auctioned to the highest bidder, the Revenue is actually seeking to re-write Clause 16 of the agreement between the erstwhile partners of MGBW. This Clause specifically states that the going concern and all the trade marks used in the course of the said business by the said firm and under which the business of the partnership is carried on shall best in and belong to the highest bidder. Under the circumstances, it is difficult to appreciate how it could be concluded by the Revenue that the trade marks were not sanctioned off and only the goodwill in the erstwhile firm was auctioned off. In D. S. Bist & Sons vs. CIT, it was held that the Act does not clothe the taxing authorities with any power or jurisdiction to re-write the terms of the agreement arrived at between the parties with each other at arm's length and with no allegation of any collusion between them. The commercial expediency of the contract is to be adjudged by the contracting parties as to its terms."

18. In the present case also, the work executed is based on a contract between the Air Port Authority, Railway Department, Department of Roads in respect of each assessment year. The Assessing Officer in respect of each assessment year takes a different view by interpreting the contract. These contracts and the work executed fall within the ambit of Section 80-IA (4). Therefore, the assessment in contradiction by interpreting the contract at their will is impermissible. It will be contrary to law.

19. In the present case, since the requirements of Section 80-IA(4) are satisfied, the assessee is entitled to the benefit of deduction under Section 80-IA(4). The respondent assessee is entitled to the deduction in

respect of all assessment years for which deduction under Section 80-IA(4) has been denied.

20. The questions of law are answered against the revenue and in favour of the assessee. All the appeals are dismissed.

(B.S.Walia)
Judge

(Ramalingam Sudhakar)
Judge

Jammu,
27.09.2016
Varun