

आयकर अपीलिय अधीकरण, न्यायपीठ –“A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri J. Sudhakar Reddy, AM and Shri A. T. Varkey, JM]

I.T.A. No. 01/Kol/2020
Assessment Year: 2016-17

ACIT, Circle-12(2), Kolkata	Vs.	M/s Simplex Infrastructures Ltd. (PAN: AA ECS 0765 R)
Appellant		Respondent

Date of Hearing	02.03.2021
Date of Pronouncement	10.03.2021
For the Appellant	Shri Mithilesh Kr. Jha, CIT
For the Respondent	Shri Ravi Tulsian, CA

ORDER

Per Shri A. T. Varkey, JM:

This appeal preferred by the Revenue is against the order of Ld. CIT(A)-4, Kolkata dated 16.09.2019 for Assessment year 2016-17.

2. The sole issue raised by the Revenue is against the action of the Ld. CIT(A) in allowing the deduction of Rs. 27,31,67,167/- u/s 80IA(4) of the Income Tax Act, 1961 (hereinafter referred to as the Act) claimed by the assessee.

3. Brief facts as noted by the AO was that the assessee company has claimed deduction u/s 80IA(4) of the Act for the profit from development of infrastructure project amounting to Rs. 27,31,67,167/-. The AO show caused the assessee to as to why the deduction should be allowed u/s 80IA(4) of the Act. The AO acknowledges that the assessee submitted a detailed reply to it explaining how it qualifies for deduction u/s 80IA(4) of the Act. However the AO disagreed with the explanation adduced by the assessee and according to AO in view of the explanation inserted below Section 80IA(13) with retrospective effect from 01.04.2008 has over-riding influence and debars the assessee's claim, because, the assessee's claim of deduction

u/s 80IA(4) are in relation to business in the nature of works contract. And thereafter he referred to the explanation to Sub-section (13) to Sec. 80IA which reads as under:

“For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).”

Thus according to AO since the assessee has been executing the business of civil construction in the nature of works contract awarded by the State Government / Central Government, the assessee is not entitled to claim deduction u/s 80IA of Rs. 27,31,67,167/- which is in respect under-takings which earns profit on developing from infrastructure facility.

4. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who allowed the claim taking note that the Tribunal in the case of assessee for AY 2010-11, 2011-12 and 2012-13 has allowed similar claim and therefore, he allowed the deduction.

5. Aggrieved the revenue is before us.

6. At the outset the Ld. A.R of the assessee, Shri Ravi Tulsian brought to our notice that similar claim of the assessee has been allowed in the earlier assessment years i.e. in AY 2008-09 AY 2010-11, AY 2011-12 & AY 2012-13, AY 2014-15, AY 2015-16; and in this year the new project was project No. 3004 with Rail Vikash Nigam Ltd. (in short RVNL). It is noted that an agreement was entered by assessee company with RVNL for construction of PSC Viaduct Embankment and stations including E & M works in connection with extension of metro railway line between CH: 2591 M to CH: 6373M for Noapara (excluding)-Baranagar-Dakshineswar of Kolkata Metro in the State of West Bengal in India. The Ld. A.R drew our attention to page nos. 686 to 791 of PB wherein the agreement between the assessee company and RVNL has been found. As we discussed in this assessment year i.e. AY 2016-17, the fresh claim is for project No. 3004 with Rail Vikash Nigam Ltd. In this respect it

is noted that an agreement was entered by assessee company with Rail Vikash Nigam Ltd. for construction of PSC Viaduct, Embankment and stations including E & M works in connection with extension of metro railway line between CH: 2591M to CH: 6373 M for Noapara (excluding)-Baranagar-Dakshineswar of Kolkata Metro in the State of West Bengal, India. In this regard, the Ld. A.R pointed out that this project has also been awarded by the RVNL for construction of PSC viaduct, Embankment and stations including E & M works in connection with extension of metro railway line between CH: 2591 M to CH: 6373 M for Noapara (excluding)-Baranagar-Dakshineswar of Kolkata Metro in the state of West Bengal, India which essentially falls within the meaning of “*infrastructure facility*” as contained in clause (a) of the Explanation, reproduced as under:

“Explanation: For the purpose of this clause, “infrastructure facility” means-

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

And he drew our attention to the agreement which is enclosed at pages 686 to 791 of the paper book and on a perusal of the same, we note the following duties and responsibilities of the assessee is as under:-

Electricity, Water and gas - The assessee shall be responsible for making his own arrangements at his own cost to obtain supply of water, electricity and/or gas for the works.

Sheds, stores, yards - It shall be the responsibility of the Contractor-assessee to provide at his own expense the required sheds, store houses, and yards for both permanent and temporary works and provide free access to the engineer and the engineer’s representative who will have right of inspection including that of instructing the Contractor to remove a particular material from the stores and not to use the same on the Works.

Temporary Works - All temporary works necessary for the proper execution of the Works shall be provided and maintained by the Contractor-assessee at his cost and subject to the consent of the Engineer. The same shall be removed by the Contractor-assessee at his own expense when they are no longer required and in such manner as the Engineer shall direct. In case the Contractor assessee fails to remove the temporary works on completion, the Engineer is authorized to get the same removed

and recover the cost thereof from the Contractor-assessee.

Contractor to keep site clear - During the execution of the works, the Contractor shall keep the site free from all unnecessary obstruction and shall store, or dispose of any Contractor's equipment or surplus materials. The Contractor-assessee shall clear away and remove from the site any wreckage, rubbish or temporary works no longer required.

All rubbish, garbage, builder's waste, malba etc shall be removed from site on a daily basis or as it accumulates, whichever is more frequent. All surface and sub-soil drains shall be maintained in a clean, sound and satisfactory state of performance. No extra payment shall be made on this account.

On completion of the works the Contractor-assessee shall clear away and remove from site all constructional plant, surplus material and temporary works. He should leave the whole of the site and works in a clean, tidy and workman like condition to the satisfaction of the engineer.

Engagement of staff and labour - The Contractor-assessee shall make his own arrangements for the engagement of staff and labour at his own cost. The Contractor-assessee shall, if required by the Employer, deliver to the Engineer or to his office, a return in detail in such form and at such intervals as the Employer may prescribe, showing the number of labour employed in different categories by the Contractor on the site.

Facilities of staff and labour - The Contractor-assessee shall provide and maintain all necessary accommodation and welfare facilities as stipulated in the employer's requirements for his (and his sub-contractor's) staff and labour.

Health and safety - Precaution should be taken by the Contractor-assessee to ensure the health and safety of his staff and labour. The Contractor-assessee shall, in collaboration with and to the requirements of the local health authorities, ensure that medical staff, first aid facilities, sick bay and ambulance service are available at the accommodation and on the site at all times, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics.

Delivery to site - The Contractor-assessee shall be responsible for procurement, transport, receiving, uploading and safe keeping of all plant, construction, materials, contractor's equipment and other things required for the completion of the works.

Testing - The Contractor-assessee shall provide all documents and other information necessary for all types of testing and such assistance, labour, materials, electricity, fuel, stores, apparatus and instruments as are necessary to carry out such tests efficiently.

7. From the aforesaid activities undertaken by the assessee we note that the contractor assessee's activities involves substantial risk. It is noted that like any other entrepreneur' who employs his material, plant, machinery, labour etc. in a project and undertakes risk, the assessee was also exposed to substantial amount of risk by virtue of engaging his establishment in the infrastructure projects. In addition, the assessee was exposed to further risk of non-completion of work within time, or of any damage caused to the works site, etc., or increase in prices of materials, labour etc. beyond what the Government had agreed to compensate as per the agreements.

Thus, we are of the opinion that it is not a case where the assessee is a works contract simplicitor, where the Government authority has provided the assessee with the entire set up i.e. plant & machinery, materials and the infrastructure needed to support construction; and all that the assessee had to employ was labour to carry out construction. Instead in this case the assessee had provided an entire enterprise which was needed to convert the site (given by the Government) into an infrastructural facility.

8. In this connection it would be gainful to refer to a recent decision of the Hon'ble Supreme Court in the case of Commissioner of Income-tax-VI v. VRM (India) Ltd. reported in [2019] 261 Taxman 164, wherein upholding the order of the Hon'ble Delhi High Court in the case of COMMISSIONER OF INCOME TAX vs. VRM INDIA LTD. (2015) 280 CTR 0036 (Del), it was held that "*where the assessee was awarded both contracts as turnkey projects and conceptualization, overall*

planning and execution, oversight of entire execution, etc. was with the assessee, it could be said that assessee was engaged in development and construction of a housing project.”

The brief facts of that case was that the assessee was engaged in business of building and developing of housing projects and it claimed deduction under section 80 IB(10) for profits derived under two projects executed and developed for DDA and IRWO.

The Assessing Officer denied deduction on the ground that assessee company did not develop and build any housing project of its own but merely executed contract work awarded to it by its principals, i.e., DDA and IRWO. The Hon'ble High Court in its order held that since assessee was awarded both contracts as turnkey projects and conceptualization, overall planning and execution, oversight of entire execution, etc., was with assessee, it could be said that assessee was engaged in development and construction of a housing project and mere circumstances that assessee, after development of infrastructure facility project, transferred same to Govt. and IRWO or DDA and they paid assessee for development of such housing project did not mean that assessee did not develop residential project, disentitling it to deduction u/s 80IB(10) of the Act. The SLP filed by the Department against the impugned order was dismissed by the Hon'ble Supreme Court ruling that where assessee, after development of infrastructure facility project, thereafter transferred the same to Government for which it was paid cost plus margin of income by Government, it would be entitled to deduction u/s 80IB of the Act. It may be noted here that although the above-said decision relates to the claim of deduction under section 80IB(10) of the Act, yet, the ratio upheld in the above-said case that where assessee has been awarded contracts as turnkey projects and has been entrusted with the full responsibility of execution and completion of work for which the assessee has to undertake huge risks in terms of deployment of technical personnel, plant and machinery, technical knowhow, expertise and financial resources it can be said that the assessee is engaged in development of infrastructure facility, fully applies in the case of the assessee.

9. In the instant case, as will be evident from the perusal of the agreements, as enclosed in the Paper book and relevant portions of which are discussed as above, all the agreements under consideration are not for a specific work, they are for development of facility as a whole. Therefore, merely because in the agreement for development of infrastructure facility, assessee is referred to as contractor or because some basic specifications are laid down, it does not detract the assessee from the position of being a developer, nor will it debar the assessee from claiming deduction u/s.80IA(4) of the Act.

10. It is noted that in a development contract, responsibility is fully assigned to the developer for execution and completion of work. It is evident that the assessee, vide the agreements, has clearly demonstrated the various risks undertaken by it. In all the agreements, relevant portions of which are reproduced supra, the assessee has undertaken huge risks in terms of deployment of technical personnel, plant and machinery, technical knowhow, expertise and financial resources. Hence, undoubtedly entering into lawful agreements and thereby becoming a contractor should, in no way, be a bar to the one being a developer since the role of a developer is larger than that of a contractor. As such it follows from the above that the assessee, who is engaged in developing the infrastructural facility, is rightfully entitled to the benefits of deduction u/s.80IA(4) of the Act. Further we note that the assessee was even assessed to VAT on the aforesaid projects. [VAT Returns are found enclosed at pages 792 to 798 and VAT Audit Report is enclosed is found placed at pages 799 to 802 of the paper book]. Further we note that in the earlier assessment years, the assessee's claim for deduction u/s 80IA(4) of the Act has been allowed and the following chart will give a bird's eye view in respect of deduction allowed in the earlier years and the item no. 5 (infra) pertains to that of this assessment year.

<i>SL. No.</i>	<i>Contract No.</i>	<i>Name of Client</i>	<i>Description</i>	<i>Net(Rs.)</i>	<i>Remarks</i>
1	2849	N.F.Railway	Bridge	3,32,43,752	Already considered and adjudicated by the Tribunal in AY 2015-16.
2	2850	N.F. Railway	Bridge	1,76,74,691	Already considered and adjudicated by the Tribunal in AY 2015-16.
3	2879	N.F. Railway	Bridge	2,37,73,102	Already considered and adjudicated by the Tribunal in AY 2015-16.
4	2931	PHED	Water supply	10,44,94,221	Already considered and adjudicated by the Tribunal in AY 2015-16.
5	3004	RVNL	METRO	89,88,711	New Project
6	2105	NHAI	Road	8,49,92,690	Already considered and adjudicated by the Tribunal in AY 2015-16.
				27,31,67,167	

11. We note that the assessee's own case for AY 2007-08 the Tribunal has confirmed the appeal of Ld. CIT(A) wherein the assessee's claim for deduction was allowed which is found placed at 1 to 16 of PB. Similarly in respect of assessee's own case for AY 2008-09 for deduction u/s 80IA has been allowed which is placed at page 17-44 of PB; and in assessee's own case for AY 2011-12 and AY 2012-13 deduction was partly allowed i.e. the Tribunal allowed the assessee's claim in respect of NHAI & Indore Municipal Corporation to the tune of Rs. 10,27,17,740/- & Rs. 1,53,70,937/- respectively. And in respect of the assessee's claim of deduction in respect of project with Bangalore Development Authority and Kolkata Municipal Corporation to the tune of Rs. 99,79,770/- & Rs. 25,84,151 was remitted back to AO to examine the terms and conditions of the contract and to allow deduction if it falls in the ken of section 80IA(4) of the Act which is found at page 58 to 97 of PB (*which*

was subsequently allowed by AO for AY 2011-12 & AY 2012-13) ; and similarly in assessee's own case for AY 2014-15 and 2015-16, the Tribunal allowed the claim of deduction u/s 80IA which is placed at 98-104 of PB. So we note that the assessee's claim for deduction u/s 80IA(4) on the profits, it earned from different projects (supra) are covered by the earlier decision of this Tribunal. In respect of its claim u/s 80IA of the Act this Tribunal has taken note that the assessee company was engaged in the construction and development of infrastructure projects such as construction of barrage, flyover etc. and the issue before the Tribunal in the earlier years was whether the Ld. CIT(A) was right in allowing the claim of deduction of profit made by the company from development of infrastructure facility as defined u/s 80IA(4) of the Act in view of the Explanation inserted under sub-section (13) of Section 80IA(4) of the Act brought in by Finance Act, 2007 w.e.f. 01.04.2000. The AO had rejected the claim for deduction u/s 80IA(4) of the Act made by the assessee that it was a developer and according to him, the assessee was a mere works contractor and in view of explanation inserted below Section 80IA(13) of the Act the assessee was disentitled to the claim and it was disallowed, which action of AO was overturned by the Ld. CIT(A) and in the Revenue's appeal before the Tribunal, the Tribunal was pleased to uphold the action of Ld. CIT(A) and thereby the claim of assessee for deduction u/s 80IA(4) was allowed in the previous years. In the relevant assessment year AY 2016-17, as we discussed, the assessee's claim of deduction u/s 80IA(4) of the Act is in addition to the five (5) projects which had already under gone our scrutiny in the earlier assessment years and has been allowed. So out of the total claim of deduction of Rs. 27,31,67,167/-, the claim of Rs. 26,41,78,456/- [i.e. Rs. 27,31,67,167 – Rs. 89,88,711] is continuing from earlier years and the Tribunal has upheld the claim in respect of Rs. 26,41,78,456/-. So in this relevant assessment year i.e, AY 2016-17, the fresh claim is in respect of project/contract No. 3004 which is in respect of agreement between Assessee Company and RVNL, and which pertains to Metro railway Infrastructure. In respect of this project (Metro) we note that the assessee in its submission before the Ld. CIT(A) has explained the nature of the projects the responsibilities, risks and duties of the assessee company. The Ld. CIT(A) has taken note of these facts which are found noted by him at pg 3 to 20 of

his impugned order. We have carefully gone through the contents of same (supra) and have discussed about it in para 6 & 7 supra and therefore we concur with the findings of the Ld. CIT(A) on this issue that assessee is a developer of infrastructure facility and so is entitled to the claim of deduction. We note that the Tribunal in earlier assessment years had examined the nature of the five (5) projects and the risk, responsibility and duties of the assessee company and gave its imprimatur to the claim of assessee u/s 80IA(4) of the Act by holding that these projects are development of infrastructure facility. The Ld. A.R has pointed out that in certain assessment years, the Tribunal had even remitted the issue of deduction u/s 80IA(4) of the Act back to the AO and the AO in those proceedings after examining the agreements and nature of risk involved in the project undertaken by the assessee, after being satisfied himself about the claim of the assessee, has allowed it and drew our attention to assessment order for AY 2011-12 and AY 2012-13. So we note that AO was satisfied with the claim of assessee company u/s 80IA(4) of the Act in AY 2011-12 & AY 2012-13 and the Tribunal has upheld the action of Ld. CIT(A) in AY 2008-09, AY 2010-11.

12. For the assessment year 2008-09 order dated 08.02.17, this Tribunal held as follows:

“Thus, the fact that the assessee deploys its resources (material, machinery, labour etc.) in the construction work clearly exhibits the risks undertaken by the assessee. Further, the assessee vide the agreements has clearly demonstrated the various risks undertaken by it. The assessee was to furnish a security deposit to the Employer and indemnify the employer of any losses/damage caused to any property/life in course of execution of works. Further, it was responsible for the correction of defects arising in the works at its cost. Thus, it cannot be said that the assessee had not undertaken any risk.

.....

6.8. From the above, it is clear that the contention of the AO that the assessee had not undertaken any entrepreneurial and investment risk is an incorrect interpretation of the facts.....

7. From the perusal of the terms and conditions in the agreement, it is clear that the assessee was not a works contractor simplicitor and was a developer and hence Explanation to section 80-IA(13) does not apply to the assessee.....

13. For the assessment year 2010-11, this Tribunal in its order dated 08.02.17 in ITA No.1840/Kol/2014 held as follows:

“8.At the outset we find that the instant issue is covered in favour of assessee in its own case by the order of Hon'ble Kolkata Tribunal in ITA NO.2168/Kol/2013 vide order dated 08/02/2017.....
9. We also find that the facts of the case of the assessee are identical as that of the above case of the assessee's own case (supra). In the light of above reasoning, we hold that the order of the Ld. CIT(A) is correct and in accordance with law and no interference is called for. We uphold the same. Hence, this ground of Revenue's appeal is dismissed.”

14. As already stated for the AY 2011-12 and A.Y 2012-13, the Tribunal restored the matter to the file of the Assessing Officer, and the Assessing Officer after examining the terms and conditions of the contract and nature of the projects and various risks undertaken by it had granted deduction 80IA(4) of the Act as claimed by the assessee in an order passed u/s 143(3) r.w.s. 251 of the Act dated 11.07.2017.

15. The Ld. CIT(A) in this assessment year has followed the earlier order of Tribunal in assessee's own case and gave relief to the assessee on the same issue and facts. The Ld. CIT-DR could not distinguish the case on facts or law. In this light of the discussions, we are of the opinion that since the assessee is a developer in the new as well as existing infrastructural projects as stated above, deduction claimed by the assessee u/s 80IA of the Act to the tune of Rs.27,31,67,167/- for the A.Y. 2016-17, to be allowed as rightly decided by Ld. CIT(A). We find no infirmity in the impugned order of the Ld. CIT(A), so we uphold the same.

16. In the result, the appeal of the revenue is dismissed.

Order is pronounced in the open court on 10th March, 2021.

Sd/-
(J.S. Reddy)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 10.03.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- ACIT, Circle-12(2), Kolkata
2. Respondent – M/s Simplex Infrastructures Ltd., 27, Shakespeare Sarani, Simplex House, Kolkata-700017.
3. The CIT(A)- 4, Kolkata (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata