

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 786 of 2023**

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THE PRINCIPAL COMMISSIONER OF INCOME TAX (CENTRAL),
AHMEDABAD

Versus

MONTECARLO CONSTRUCTION LTD.

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Appearance:

MR.VARUN K.PATEL WITH MR DEV PATEL, ADVOCATE (3802) for the
Appellant(s) No. 1

for the Opponent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 19/12/2023

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned advocate Mr.Dev Patel with learned Senior Standing Counsel Mr.Varun K. Patel for the appellant.
2. The Revenue has preferred this appeal under Section 260A of the Income Tax Act, 1961 (for short "the Act") proposing the following substantial question of law arising out of the order of the Income Tax Tribunal, B Bench Ahmedabad (for short "the Tribunal") vide order dated 28.06.2023 passed in IT(SS)A.No.1892/Ahd/2013 for A.Y. 2008-09:

“(a) Whether in the facts and circumstances of the case and in law, the learned ITAT has erred in deleting the disallowance of Rs.6,20,01,678/-, made u/s 80IA(4) of the Income Tax Act, 1961 by holding that the assessee is not a contractor, but developer of infrastructure facilities and is eligible for deduction u/s.80IA(4) of the Income Tax Act, 1961?”

3.The brief facts of the case are as under:

- 3.1. The respondent assessee which is a Private Limited Company was engaged in business of construction activity and development of infrastructure and other projects i.e. irrigation canals, road construction.
- 3.2. The assessee filed its return of income on 20.08.2008 declaring total income of Rs.25,15,950/- after claiming the deduction under Section 80IA(4) of the Act for an amount of Rs.6,20,01,678/- only for the year under consideration.
- 3.3. The assessing officer however, disallowed the deduction under Section 80IA (4) of the Act on the ground that the assessee is not a developer but as works contractor relying

upon the explanation after Subsection 13 of Section 80IA of the Act.

- 3.4. Being aggrieved the assessee preferred appeal before the CIT (Appeal). The CIT (Appeal) allowed the appeal by observing as under:

"40. Considering the above discussion wherein it is amplified by quoting various clauses of agreements entered between the appellant and the respective State Government bodies, it becomes clear that the appellant cannot be merely considered as a contractor. The perusal of scope of work, the designing responsibility of the appellant, mobilization of funds and the construction material, the inherent risk because of improbable factors determining the execution of the project indicate that the appellant cannot be considered as a contractor. It may be clarified that a contractor is a person who does only civil construction and once the job of civil construction is over, his contract is over and the agreement ends. The contractor works as per the design and specification given and he does not involve much of his own money but raises the bill for his civil construction work time to time to collect the expenditure incurred. On the other hand, a developer is a person who takes full

responsibility to develop the project by involving his managerial as well as financial responsibilities. Essentially, a developer has to design the project as per the specifications given to whom and thereafter has to execute the construction work in the capacity of a contractor. During the period of execution of project, the developer temporarily become the owner of the site on which the project is executed. In real terms, the ownership always remains with the Government. On the other hand, from the perusal of various clauses of agreement that the appellant cannot be merely termed as a contractor in the facts of this case. I am also of the view that merely the fact that the appellant is termed as 'contractor' in the various agreements and also the fact that TDS is made u/s, 194C, one cannot infer that the appellant as contractor. the issue of ownership as pointed out by the AO has already been settled by the Hon'ble ITAT, Ahmedabad that it is not envisaged in the section that the appellant should be the owner of the infrastructural project

41. Accordingly, Having regard to the facts and circumstances of the case and the ratio of judicial pronouncements cited supra and also the judgment of Bombay high Court in the case of ABG Heavy Industries, judgment of Gujarat High Court in the case of Radhe Developers and the

judgment of the ITAT Ahmedabad in the case of Sugam Construction Pvt Limited, and also the Circular number 4, cited supra, I am of the view that the Appellant. Company is a developer of infrastructure facilities and is eligible for deduction u/s 801A(4) of the Act The Disallowance made by the AO of the appellant's claim for deduction u/s 801A(4) amounting to Rs.6,20,01,678/- is therefore not sustainable. The same is hereby ordered to be deleted and the claim of deduction by the Appellant is hereby allowed.

42. The appeal is thus allowed."

3.5. The Revenue being aggrieved by the order of the CIT (Appeal) preferred the appeal before the Tribunal contending that the income derived from the use of infrastructure facility developed by the assessee is only eligible for reduction under Section 80IA (4) of the Act but in the facts of the case, the contract work was awarded to the assessee through the bidding process where the lowest contract value was quoted by the assessee after considering the element of profit. It was therefore contended that the assessee was acting as a works contractor and income was derived by way of developing the

infrastructure facility and not from the use of development facility.

3.6. It was further contended before the Tribunal that the purpose of the deduction under Section 80IA (4) of the Act was that the private players of the parties will bring the investment for the development of the infrastructure facility and later on the facility will be exploited for generating the income which is only eligible for the purpose of deduction under Section 80IA (4) of the Act. It was therefore contended that for the such purpose, various concepts has Built, Own Operate and Transfer (BOOT) and Built, Own, Lease and Transfer (BOLT) and Built, Operate and Transfer (BOT) was introduced. It was therefore submitted that no initial investment made by the assessee in the projects and the projects were funded by the employer. It was also pointed out that the assessee made investment which are in the nature of earnest money, performance guarantee and mobilization advance but such concepts are also applicable in case of the works contract.

3.7. The Tribunal after considering the

submissions of the assessee and after analysing the facts of the case arrived at the following conclusion:

"11.16 On the detailed analysis of the above project, we find that the assessee meets the criteria laid down for the developer as discussed above. As such, the assessee was to make detailed drawings, design calculations/fabrication etc. at its own cost. Further, the assessee is also responsible for arranging methods of the execution of work along with detailed drawings, sketches, furnishing the details of sufficient plants, equipment, and labor. The assessee has to arrange the land for a temporary site office, office laboratory, parking yard, store yard, labor camp, workshop etc. The assessee was duty bound to protect the environment on and off the staff site and avoid the damage or nuisance etc. to the persons or to the property of the public. The assessee was to maintain at its own cost sufficient experienced supervisory staff required for the work and arrangement of their housing. The assessee was to have the field laboratory for the purpose of testing materials. The assessee has to arrange electric power and water supply. The assessee was also under the obligation to provide traffic safety arrangements like sign board, speed limit speed breakers, diversion board, etc. Besides the above, the assessee was to pay the liquidated damages in case of delay in the completion of project and other

defaults.

11.17 The purpose for which the provisions of section 801A (4) were brought under the statute were achieved in the given facts and circumstances. 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 tender document as discussed above has clearly demonstrated the various risks undertaken by it. The assessee was to furnish a security deposit to the employer and indemnify at the same time for any losses/damage caused to any property/life in course of execution of works. Further, the assessee was responsible for the correction of defects arising in the works at its own cost. For that purpose, the MPRDCL retained the money payable to the assessee as a measure to ensure the quality of the work and to make liable the assessee in the event of a defect, if any. Thus, it cannot be said that the assessee had not taken any risk in the given facts and circumstances especially when the assessee has undertaken the project as a whole for the development of the road right from the beginning till the end. Thus, on perusal of the terms and conditions in the tender documents furnished by the assessee, it is clear that the assessee was not a works contractor simply but a developer and hence, the explanation to section 80- IA(13) does not apply to the assessee."

3.8. The Tribunal also dealt with the contention raised on behalf of the Revenue with regard to the issue of award of contract by the MPRDCL, a nodal agency being wholly owned undertaking of the Government of Madhya Pradesh as such contention was raised that the assessee was only awarded the works contract and therefore no development was undertaken by the assessee. The Tribunal observed as under:

"11.25. The next aspect of the case is that the impugned project for the road development as discussed above was awarded by the MPRDCL- a nodal agency being a wholly owned undertaking of the Government of Madhya Pradesh. MPRDCL in its books of accounts will not record the payment made to the assessee in the form of expenses. It is because MPRDCL against such expenditure has not shown any income. It also appears that MPRDCL is not claiming any deduction under section 801A(4) of the Act. At the time of hearing, a question was raised to the learned DR but he failed to provide any information with respect to the deduction claimed by MADC u/s 801A(4) of the Act. Thus, the question arises who will claim the deduction under section 801A(4) of the Act. As such, we are of the view that the provisions of section 801A(4) should not be read in a way to make it redundant or irrelevant. Accordingly, we are inclined to grant the benefit to the assessee under the

provisions of section 801A(4) of the Act."

3.9. With regard to the contention raised by the Revenue to the effect that the explanation to below Subsection 13 of Section 80IA of the Act is applicable and in response to such contention, the Tribunal analysed the scope of the explanation to below Subsection 13 of Section 80IA of the Act as under:

"11.6. Subsequently, an Explanation to section 80-IA of the Act was inserted by the Finance Act, 2007 and later on amended by the Finance (No.2) Act, 2009 but the same was made applicable with retrospective effect i.e. 1-4-2000. This explanation denies the benefit of deduction under section 80-IA(4) of the Act to a person who executes a project which is in the nature of works contract. At this juncture, it is pertinent to refer the provisions of the Explanation attached below section 80-IA(13) of the Act as reproduced below:

"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)."

3.10. Thus there are concurrent findings of fact arrived at by the CIT (Appeal) as well as the Tribunal that the assessee has undertaken the development of infrastructure facility and is eligible to claim the deduction under Section 80IA(4) of the Act.

3.11. Section 80IA of the Act provides for deduction from the gross total income of the assessee which includes any profit and gains derived by an undertaking or an enterprise from any business referred to in Subsection 4 of the Act as eligible business by providing deduction of an amount equal to the 100% of the profit and gains derived from such business for 10 consecutive assessment years. Subsection 4 of Section 80IA of the Act reads 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 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:"

3.12.Explanation below Subsection 13 of Section 80IA of the Act was introduced by the Finance (No.2) of the Act, 2009 with effect from 01.04.2000, reads as under:

"[Explanation. 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).]"

Both the explanations basically emphasizes on the non allowability of deduction u/s 801A(4) to an enterprise merely executing "works contract" awarded by what so ever person including the Central or State Government. Accordingly any person who executes the Infrastructure l'acility related work in capacity of a "Developer" shall only be allowed deduction u/s 801A(4) of the Act.

Therefore, for claiming the deduction u/s 801A(4) after the insertion of above explanation, the Assessee has to pass the test of "being Developer of infrastructure facilities", accordingly the Assessee was asked to prove & establish its capacity of "Developer of infrastructure facilities", accordingly the Assessee has made a detailed submission narrating the following facts & points to prove & establish its capacity as a "Developer of infrastructure facilities"

3.13. Sub-clause 1 of Sub-section 4 of Section 80IA of the Act provides that Section 80IA applies to any enterprise carrying on the business of "(1)developing, or (2)operating

and maintaining or (3) developing operating and maintaining" any infrastructure facilities which fulfills the condition prescribed therein. In the facts of the case as held by the CIT (Appeals) as well as the Tribunal on giving a factual finding to the effect that the assessee has undertaken a work of development of infrastructure facilities by execution of the contract awarded to it as per the terms of the contract as enumerated by the CIT (Appeal) as under:-

*"To examine whether the project assigned to this Appellant was in the capacity of a "Contractor" or the Appellant has executed the work as a "Developer" with respect to the ROAD PROJECTS, I have perused the terms of some of the agreements. My attention has been drawn on agreements with **"Madhya Pradesh Road Development Corporation Limited"**, from which the Appellant have been awarded two Road Projects, wherein the scope of the work has been defined as follows:-*

Sr. No.	Name of Road	Approx. Length in Km.	Scope of Bid/ Development Work
1	Package-1: Chindwara-Amarwara-Narsingpur" Road	103.3	Rehabilitation, Widening,

	Project: SH 47		Upgradation & Strengthening
2	Package-14: "Lakhnadon-Mandla-Dindori" Road Project: SH 11 & 40	149.8	

18 The Appellant has drawn my attention to the relevant clauses of the Tender Documents in support of its contention of being "Developer of the Infrastructure Facilities"

3.14. The CIT (Appeal) has further examined as to whether the project assigned to the assessee was in capacity of a contractor or the same was executed as a developer with respect to the canal projects, agreements were entered into by the assessee was analysed and tendered documents containing the terms and conditions of the project were taken into consideration with respect to the following aspects as to the entire investment in the project was to be made by the assessee. Interim payment to the tune of estimated contract value in respect of the development work done for each month after retention and other adjustments were to be made, security deposit was to be paid by the assessee, there

was a penalty for delay, procurement of the material was the responsibility of the assessee, procurement of land for camp, for shop, labour camp etc. also the employment of qualified engineers, action and compensation in respect of bad work, defect liability of the accidents to persons in relation to Workman Compensation Act, indemnity insurance of the workmen employed. The CIT (Appeal) and the Tribunal considering such aspects of the tendered agreement, concurrently held that the assessee has entered into a development of infrastructure facility agreement and not the works contract.

4. In view of the above concurrent finding of the facts, we are of the opinion that no question of law, much less any substantial question of law arises from the impugned order of the Tribunal. The appeal therefore being devoid of any merit is accordingly dismissed.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA, J)

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